TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 133.

THE GUTHRIE NATIONAL BANK, PLAINTIFF IN ERROR AND APPELLANT,

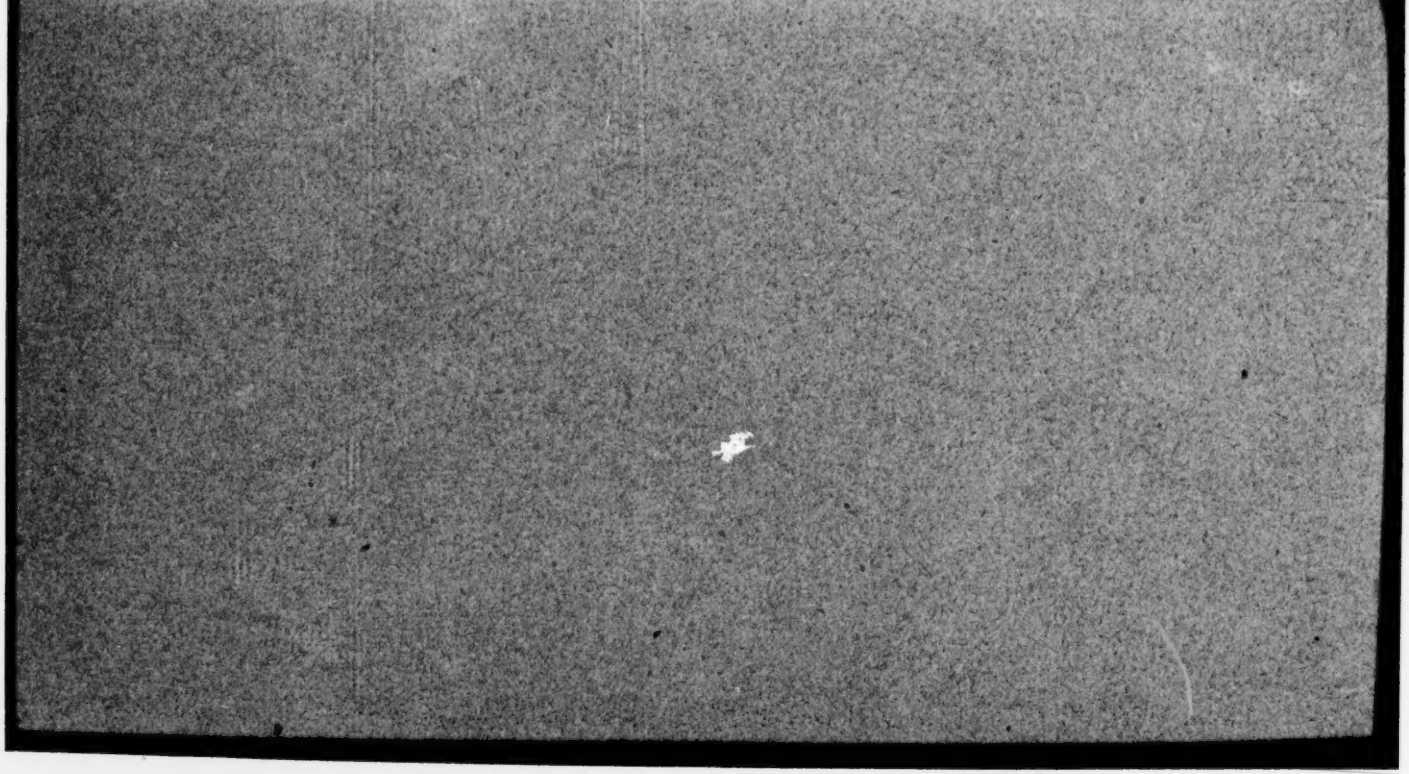
vs.

THE CITY OF GUTHRIE.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED JULY 10, 1897.

(16,625.)



(16,625.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 412.

THE GUTHRIE NATIONAL BANK, PLAINTIFF IN ERROR AND APPELLANT,

vs.

THE CITY OF GUTHRIE.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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a Be it remembered that the following original writ of error was deposited in the office of the undersigned, Edgar W. Jones, clerk of the supreme court of the Territory of Oklahoma, on the eleventh day of June, A. D. 1897, and in pursuance to the commands contained in the said writ of error I herewith return into the Supreme Court of the United States a full, true, and complete transcript of the record in the cause entitled, in said supreme court of the Territory of Oklahoma, The Guthrie National Bank, plaintiff, against The City of Guthrie, defendant, being the same identical case mentioned and described in the annexed writ of error, and the transcript herewith returned is as follows, to wit:

b UNITED STATES OF AMERICA, } ss:
Eighth Judicial Circuit, Territory of Oklahoma, }

The President of the United States to the honorable judges and clerk of the supreme court of the Territory of Oklahoma:

Because in the record of proceedings, as also in the rendition of the judgment of a plea which is in said court, upon a petition in error, before you, wherein The Guthrie National Bank is plaintiff in error and The City of Guthrie is defendant in error, which said judgment was rendered as a judgment of affirmance of the judgment of the district court of the county of Logan and Territory of Oklahoma, complained of in your court by such petition in error, a manifest error hath happened, to the great damage of the said The Guthrie National Bank, plaintiff in error, as by its complaint and its assignment of errors appears, we, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, in the city of Washington, together with this writ, so that you have the same at the office of the clerk of said Supreme Court of the United States, at the city of Washington, on the 11th day of July, A. D. 1897, next, in the said Supreme Court of the United States to be then and there held, and that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause fur-
c ther to be done therein and to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 11th day of June, A. D. one thousand eight hundred and ninety-seven, in the one hundred — twenty-second year of the Independent of the United States of America.

Allowed in open court.

[Seal Supreme Court, Territory of Oklahoma.]

FRANK DALE,
Chief Justice of the Territory of Oklahoma.

Attest: EDGAR W. JONES,
Clerk of the Supreme Court
of the Territory of Oklahoma.

d [Endorsed :] In the supreme court of Oklahoma Territory. The Guthrie National Bank *vs.* The City of Guthrie. Writ of error. Filed June 11, '97. Edgar W. Jones, clerk. S.

e Be it remembered that on the twenty-ninth day of March, A. D. 1897, there was filed in the office of the clerk of the supreme court of the Territory of Oklahoma a petition in error with a case-made thereto attached; which said petition in error and case-made thereto attached are in words and figures following, to wit:

1 In the Supreme Court of the Territory of Oklahoma.

THE GUTHRIE NATIONAL BANK, Plaintiff in Error,
vs.
THE CITY OF GUTHRIE, Defendant in Error. } Petition in Error.

Comes now The Guthrie National Bank, plaintiff in error, and for its cause of action in error alleges that heretofore and on, to wit, the 9th day of March, A. D. 1891, the district court of the county of Logan and Territory of Oklahoma appointed a commission, composed of John Foster, M. D. Losey, and A. J. Diehl, for the purpose of auditing and adjudicating certain claims existing against the provisional government of Guthrie, East Guthrie, Capitol Hill, West Guthrie, and the Consolidated Guthrie School District, being provisional corporations existing within the territory now embraced in the city of Guthrie, for municipal purposes prior to the second day of May, A. D. 1890, and after the opening of Oklahoma Territory to settlement, and that said commissioners duly entered on the discharge of their duties and audited the claims existing against said provisional governments and duly returned into court their report of such auditing, adjudication, and determination of such various claims against said provisional governments as a charge against the said city of Guthrie and the property therein contained, and which report of the said commissioners was duly docketed in said court, and this plaintiff acquired and became the owner of divers and sundry of such claims so audited and allowed by said board, amounting in the aggregate to four thousand three hundred and fifteen and $\frac{22}{100}$ dollars ($4,315.22), and the said cause remained pending in said court until the second day of April, A. D. 1896, at which time the court entered an order in said cause dismissing the said cause for the reason, to wit, that said act of the Legislative
2 Assembly of the Territory of Oklahoma under which all of said proceedings were had was null and void and unconstitutional, and dismissed all of said proceedings and refused to consider the claims held and owned by the said plaintiff so audited, adjudicated, and determined by the said commissioners; all of which proceedings fully appear by a case-made hereto attached, marked "Exhibit A," and hereby referred to and made a part of this petition in error. By said petition in error it is alleged that substantial error was committed by said court to the substantial prejudice of this plaintiff in error, to wit:

First. The court erred in refusing to consider the motion and application of this plaintiff in error to confirm said report and to make the entries of confirmation of said report as to the claims held by this plaintiff in error.

Second. The court erred in dismissing said cause from the dockets of said court.

Third. The court erred in holding the law, to wit, article 1, chapter 15, of the Revised Statutes of the Territory of Oklahoma for the year 1890 unconstitutional and void.

Wherefore the said plaintiff in error prays that the said judgment of the court be reversed and the said cause be remanded and the said proceedings be reinstated, with directions that the court proceed to hear and determine the rights of this plaintiff in error and to confirm the report and direct the issuance of the warrants and the levy of a tax for the payment and satisfaction of the said plaintiff's claims in conformity to the provisions of the statutes hereinbefore referred to.

ASP, SHARTEL & COTTINGHAM,
Att'ys for Plaintiff in Error.

3 "EXHIBIT A."

In the District Court of the County of Logan and Territory of Oklahoma.

GUTHRIE NATIONAL BANK, Plaintiff,
vs.
CITY OF GUTHRIE, Defendant. } Case-made.

Be it remembered that heretofore and on the ninth day of March, A. D. 1891, the district court, by the hand of the judge of said court, in the county of Logan and Territory of Oklahoma, made and entered a certain entry on the journal of said court in pursuance of the provisions of article 1 of chapter 15 of the Revised Statutes of the Territory of Oklahoma for the year 1890, appointing a commission, composed of John Foster, M. D. Losey, and A. J. Diehl, to perform the duties as defined and laid down in said statute, fixing the compensation of said commissioners at the rate of three dollars ($3.00) per day, and requiring the said commissioners each to appear before the clerk of the district court of Logan county and take and subscribe an oath to faithfully and impartially perform the duties as such commissioners, and requiring the said board to publish for ten days in some daily paper published in the village of Guthrie, in said county, a notice of the time and place where and the person with whom claims may be filed, and that at the expiration of said time the said commissioners meet and cause a list of all claims filed with them for action to be published against each subdivision of said village of Guthrie separately, and continue such publication for three days, and on the expiration of said second publication that the said board meet and proceed forthwith to pass upon all claims presented against the subdivisions of said village of Guthrie, and to

hear and determine all matters relating thereto; and other provisions were contained in said order concerning the method of procedure of the said commissioners, and, among others, the said com-
4 missioners were required to keep a record of their daily proceedings and to return the same, with a report of their proceedings, into court, and requiring all of their records to be certified into said court on the completion of their said labors, where the same shall remain on file as a part of the records of said court.

And afterwards and on the same day the said persons so appointed as such commissioners appeared before the clerk of said court and duly took and subscribed an oath to support the Constitution of the United States, the organic act, and the laws of said Territory of Oklahoma, and that they will faithfully, impartially, and to the best of their ability discharge the duties of said commission.

And thereupon and on the twelfth day of March, 1891, the said commissioners caused to be inserted in the "Guthrie Daily News," a newspaper published in said village, a notice directing all claimants to appear and present their claims against either or any of the said subdivisions of the said village of Guthrie against the said respective provisional governments of the said respective subdivisions of said village of Guthrie.

Thereafter and on the twenty-third day of March, 1891, the said commissioners caused the second notice to be published for three days, as provided by said order, listing all claims so presented to said commissioners.

And the said commissioners thereupon entered on the discharge of its duties in the hearing and determination of the said claims, as provided by the said order, and continued its proceedings from day to day, under various extensions of time granted to said commission by the judge of said district court, until on or about the first day of September, A. D. 1891, at which time it filed its final report in the district court of the county of Logan and Territory of Oklahoma, together with its record of its proceedings and the papers filed before said board.

That the said report so filed by the said commissioners is
5 too voluminous to copy in full in this record, and those parts only affecting claims held and owned or claimed to be held and owned by this plaintiff are given in full; but by said report it appears that the various allowances were made by said board, as shown by the certain copy of a motion to dismiss exhibited herein from pages 23 to 42, inclusive, of this record, with the exception that the list entitled "claims based on warrants issued by the provisional city of East Guthrie and disallowed by the Guthrie claims commission" is in error with respect to claims numbered 18, 19, 20, 21, 22, 23, 24, and 25, and claims numbered 32 and 33, which should be carried in the following list: "Claims based on warrants issued by the provisional city of East Guthrie and allowed by the Guthrie claims commission."

The report of said commission contains the following entries with reference to the various claims claimed to be owned by the said Guthrie National bank, to wit: The said report shows the allowance

of each and all of the said claims represented and scheduled in the petition and motion of the Guthrie National bank against the city of Guthrie, herein set out, and which said claims allowed and claimed to be owned by the Guthrie National bank are as follows, and that the city attorney of said city of Guthrie appeared at the hearing and allowance of said claims and defended for the said city:

Provisional Government, City of Guthrie.

No. of claims.	No. of warrants.		Amount allowed.
" 26	" 623	D. T. Flynn..	$25 00
" 35	" 542	J. W. McNeal..	68 75
" 36	" 597	" ..	20 00
" 37	" 962	" ..	30 00
" 38	" 904	" ..	16 00
" 39	" 515	" ..	5 20
" 40	" 400	" ..	39 50
" 41	" 526	" ..	17 50
" 42	" 475	" ..	5 25
" 43	" 448	" ..	18 50
" 44	" 586	" ..	31 75
" 45	" 554	" ..	13 00
" 46	" 547	" ..	4 00
" 47	" 546	" ..	82 49
" 48	" 553	" ..	18 00
" 49	" 549	" ..	18 00
" 50	" 585	" ..	75 00
" 51	" 570	" ..	4 00

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No. of claims.	No. of warrants.		Amounts allowed.
" 52	" 336	J. W. McNeal..	$10 00
" 53	" 517	" ..	5 00
" 54	" 450	" ..	35 50
" 55	" 614	" ..	252 38
" 91	" 1010	J. J. Graham...	29 50
" 92	" 1014	" ..	3 50
" 93	" 1015	" ..	25 00
" 94	" 1041	" ..	75 00
" 95	" 888	T. S. Jones.....	100 00
" 111	" 1034	D. T. Flynn ...	6 67
" 112	" 1030	" ...	25 00
" 113	" 1031	" ...	25 00
" 114	" 1032	" ...	25 00
" 115	" 1033	" ...	25 00
" 116	" 1067	" ...	64 00
" 161	" 960	" ...	40 00
" 164	" 1019	Harry P. Clark.	22 47
" 195	" 369	John E. Ford..	30 00
" 196	" 370	" ..	120 00
" 197	" 368	" ..	300 00

No. of claims.	No. of warrants.		Amounts allowed.
" 198	" 671	John E. Ford..	$100 00
" 199	" 712	" ..	100 00
" 200	" 763	" ..	100 00
" 201	" 809	" ..	100 00
" 202	" 830	" ..	100 00
" 203	" 926	" ..	100 00
" 204	" 937	" ..	100 00
" 205	" 971	" ..	100 00
" 206	" 1012	" ..	100 00
" 207	" 1051	" ..	100 00
" 211	" 851	Thos. S. Jones..	40 00

Second. Claims based upon warrants issued by the provisional city of East Guthrie, which were allowed by the Guthrie claims commission:

No. of claims.	No. of warrants.		Amount allowed.
" 18	" 210	P. K. Albert...	$12 25
" 19	" 234	" ...	17 72
" 20	" 282	" ...	19 75
" 21	" 172	" ...	50 00
" 22	" 197	" ...	50 00
" 23	" 262	" ...	50 00
" 24	" 293	" ...	50 00
" 25	" 303	" ...	8 30
" 32	" 106	J. W. McNeal..	7 50
" 33	" 216	" ..	49 50
" 59	" 305	D. T. Flynn ...	40 00
" 150	" 271	Russel Briggs..	2 50
" 151	" 180	Russel Briggs..	8 60
" 195	" 226	G. H. Lynds...	50 00
" 13	"	John Bingham.	38 00
" 10	" 600	John E. Ford...	600 00

Third. Claims allowed against Capitol Hill:

No. of claims.	No. of warrants.		Amount allowed.
" 2	" 5	D. T. Flynn...	$12 00

7 Fourth. Claims based upon warrants issued by the consolidated school district of Guthrie and allowed by the Guthrie claims commission:

No. of claims.	No. of warrants.		
" 11	" 29	J. W. McNeal.....	$9 10
" 12	" 46	"	35 00
" 13	" 65	"	35 00
" 14	" 85	"	35 00
" 24	" 53	Carrie I. Anderson....	21 02
" 25	" 72	"	35 00
" 26	" 84	"	35 00

No. of claims.	No. of warrants.		
" 29	" 45	Alma Carson.....	$15 40
" 30	" 67	"	35 00
" 31	" 77	"	35 00
" 48	" 82	D. T. Flynn.....	35 00

Total amount of claims allowed against the city of Guthrie and now owned by the Guthrie National bank is.....	$2,826 21
Total amount allowed against East Guthrie.....	1,054 02
Total amount against Capitol Hill.....	12 00
Total amount of consolidated school warrants.....	325 52
Amount allowed to Clark as city treasurer.....	97 47
	$4,315 22

That by said report it appears that the total amount of claims allowed by said commissioners based on warrants issued by the provisional city of Guthrie was the sum of $8,452.01, and that the claims not based on warrants issued by the provisional city of Guthrie allowed by the said claims commission was $1,102.36, and that the total amount of claims presented and disallowed by the said claims commission was the sum of $8,337.80.

That the total amount of claims allowed by the said commission based on warrants issued by the provisional city of East Guthrie was and is the sum of $2,798.32, and the amount of claims allowed against the provisional city of East Guthrie not based on warrants, $1,284.25; claims disallowed against the provisional city of East Guthrie based on warrants issued by said provisional city, $2,055.12; claims disallowed against said city which were not based on warrants of said provisional city of East Guthrie, $9,691.72.

8 That the total amount of claims allowed on account of the indebtedness of the provisional city of Capitol Hill by said commission is and was the sum of $691.20, and the amount of disallowance on account of alleged indebtedness of said provisional city of Capitol Hill is $1,875.

That the total amount of allowances on account of the provisional consolidated school district of Guthrie was the amount of $3,573.70, and the disallowances of claims against said provisional school district was $236.15.

That subsequent to the time of the appointment of said claims commission the said village of Guthrie became a municipal corporation, and at all times since has remained such municipal corporation, under the style and name of the city of Guthrie, and that the said city of Guthrie is the successor of the village of Guthrie named in said act of the Legislative Assembly of said Territory.

And on the incoming of said report the said case was docketed as a pending case in said court, and was continued from time to time and remained undisposed of, and on the seventh day of April, 1893, the attorney for the said city filed his exceptions in said cause in words and figures as follows, to wit:

In the District Court of Logan County, Territory of Oklahoma.

In the matter of claims against the city of Guthrie contracted by the provisional governments of the cities of Guthrie, East Guthrie, Capitol Hill, and West Guthrie, referred to John Foster, M. D. Losey, and A. J. Deal, referees, in cases of claims of—

J. W. McNEAL *et al.*, Including All Claimants,
vs.
CITY OF GUTHRIE.
} Exceptions to Report of Referees.

Now comes The City of Guthrie, by J. L. Pancoast, city attorney, and excepts to the report made and filed herein by said ref-
9 erees and to each and every finding, rule, order, and decision made, and to each and every part thereof, for the following reasons, to wit:

I. For that when John Foster, M. D. Losey, and A. J. Deal, referees, were appointed and the matters herein were referred to them as such by order of the district judge of March 10, 1891, there was no action or suit pending in any court, no issues joined in any action pending in any court, and nothing to refer to referees or commissioners.

II. For that article 1 of chapter 14 of the Statutes of Oklahoma, an act under and in pursuance of which said referees were appointed, is unconstitutional, is in violation of the acts of Congress, and void, in this:

A. That it divests rights and takes property without due process of law.

B. Is a special statute regulating practice in courts of justice.

c. Delegates judicial powers in the district judge.

d. Deprives the city of Guthrie of the right of trial by jury.

e. Is in violation of section 4, chapter 848, U. S. Statutes at Large.

f. Imposes greater obligations than the original obligation assumed.

g. Creates a new party to the contract where none before existed, and making that party liable for contracts never made by such party.

III. For that said article 1 of chapter 14 legalizes contracts made by the so-called provisional governments of the cities of Guthrie, East Guthrie, Capitol Hill, and West Guthrie, and imposes the burden of payment thereof upon the city of Guthrie, a municipal corporation organized by virtue of the acts of Congress and the laws of Oklahoma, without the consent of the said city of Guthrie, some of which contracts were fraudulent in their inception and many others which are beyond the authority usually given to officers of *de jure* municipal corporations to contract.

10 IV. For that the city of Guthrie had no opportunity to appear and make objections to the appointment of referees or to have any voice in fixing their compensation.

V. For that the district judge in making said order of March 10, 1891, appointing said referees exercised legislative power.

VI. For that the report of said referees does not comply with the orders of the district judge, in this:

a. That it does not show that a true and correct record of all its proceedings and acts was kept regarding each and every claim submitted for allowance and approval.

b. That it does not contain a record of the evidence taken before said referees.

c. It does not show the nature of the respective claims allowed, so that it can be determined from said report whether the claims so allowed by them *is* such as *is* contemplated by article 1 of chapter 14 of the Statutes of Oklahoma.

d. That the certificate attached to said report is indefinite and uncertain and does not certify that the record and papers submitted contain a full report of the evidence and the acts of said referees.

e. That there is no finding in said report by said referees showing what, if any, claims were allowed or disallowed by such referees or the amount thereof.

VII. For that said report is not made and signed by all of said referees appointed to which said matter was referred, but, on the contrary, is only made and signed by two of the said referees.

VIII. That the report made by said referees is simply a deposit of the books kept by said referees concerning certain portions of the matters transacted by them in the adjudication of claims, together with a mass of papers which are disconnected, and is not in form such a report as is contemplated to be made by referees, and is not such a report as is required by law.

11 IX. For misconduct of said referees in failing and refusing to comply with the orders of the district judge made September 22, 1892, and contained in Journal 4, page 247, which required said referees to make a full and complete report of their doings in the premises, and that before submitting said report that they allow the city attorney of the city of Guthrie to examine the same and take such exceptions, file such motions, and take such other steps as might be proper in the premises.

X. For that said report shows that certain claims were allowed that were not contemplated by article 1 of chapter 14, and among which of said claims are the following:

Claim No.	4,	warrant No.	806.....	$100 00
				Page 130.
"	39,	"	515.....	5 20
"	47,	"	546.....	82 49
"	55,	"	614.....	252 38
"	70,	"	680.....	148 56
				Page 131.
"	118,	"	883.....	100 00
"	123,	"	595.....	12 75

Claim No. 124,	warrant No.	675	$300 00
" 126,	"	179	150 00
" 142,	"	606	75 00
" 143,	"	504	68 00
" 144,	"	744	55 00

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" 157,	"	985	171 90
" 173,	"	983	200 00

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" 195,	"	369	30 00
" 196,	"	370	120 00
" 197,	"	368	300 00
" 198,	"	671	100 00
" 199,	"	712	100 00
" 200,	"	763	100 00
" 201,	"	809	100 00
" 202,	"	830	100 00
" 203,	"	926	100 00
" 204,	"	937	100 00
" 205,	"	971	100 00
" 206,	"	1012	100 00
" 207,	"	105	100 00

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" 236,	"	618	25 00
" 237,	"	808	25 00
" 238,	"	717	25 00
" 239,	"	543	10 00
" 251,	"	678	50 00

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Also claims allowed in cases to which no warrant was ever issued as follows:

12 Claim No.	2	$38 00
"	5	389 75
Claim No.	6	23 00
"	8	26 25
"	9	15 17
"	12	25 00
"	14	23 00
"	16	16 20
"	17	14 60
"	18	14 95
"	24	11 00
"	26	16 00
"	27	65 00
"	29	55 00
"	30	15 00

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All of which above claims were allowed as having been issued by the provisional government of the city of Guthrie.

Also claims allowed as having been issued and contracted by the city of East Guthrie, as follows:

Claim No.	10		$50 00
"	48, warrant No.	272	5 00
"	24, "		10 00
"	236, "	236	24 00
"	80,	237	30 25
"	82,	199	26 25
"	102, "	172	57 50
"	103, "	127	28 00
"	104, "	171	27 50
"	123, "	179	48 80
"	129, "	240	24 00
"	130, "	239	29 00
"	131, "	201	25 00
"	134, "	180	240 00

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"	193, "	221	40 00
"	221, "	202	3 75
"	222, "	207	18 00
"	223, "	235	30 75
"	224, "	238	18 00

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Also claims for which no warrants were ever issued and allowed against the provisional government of the city of East Guthrie, as follows:

Claim No.	3		$7 50
"	4		13 75
"	6		24 00
"	10		600 00
"	12		63 00
"	14		40 00
"	15		40 00
Claim No.	16		40 00
13 "	17		40 00
"	18		40 00
Claim No.	19		40 00
"	20		15 50
"	21		40 00

Page 146.

Also claims allowed against the provisional government of the city of West Guthrie, as follows:

Claim No.	1, warrant No.	59	$71 00
" "	"	29	200 00

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Also claims allowed as issued by the provisional government of the city of Capitol Hill, as follows:

Claim No. 1,	warrant No. 43		$20 00
" 2,	" 39		14 00
" 3,	" 40		14 00
" 4,	" 41		14 00
" 5,	" 42		14 00
" 6,	" 33		3 20
" 3, to which no warrant was issued			$600 00

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Also claims allowed as issued and contracted by the consolidated school district of Guthrie, as follows:

All claims from No. 1 to 49, inclusive, amounting to			$3,573 70
And particularly claim No. 32,	warrant 32611		952 69
" 33,	" 32025		1,262 60
" 34,	" 32613		64 02

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XI. For that a very large portion of the number of claims presented to said commission or referees were allowed by said referees without hearing any evidence bearing upon the validity of such claims, and without requiring the claimants to produce any evidence showing that such claims were valid under the provisions of chapter 14 and such as were contemplated by said chapter. The particular claims so allowed cannot be set out specifically herein, on account of there being no record showing specifically which of the claims presented were so allowed.

XII. For that the City of Guthrie is entitled to a trial by jury upon each and every claim and demand contained in the report of said commission and presented to said commission; that the
14 right of such trial by jury has never been granted to the City of Guthrie, and no provision therefor is contained or contemplated in chapter 14 of the laws of Oklahoma, and the City of Guthrie now here claims the right of and demands a trial in a court of competent jurisdiction by jury upon each and every question of fact presented and involved in each and every claim allowed by said commission or referees.

The City of Guthrie therefore prays that the report of said commissioners and each and every part thereof, as to any claim allowed, be disapproved and set aside.

(Signed) J. L. PANCOAST,
City Attorney.

Endorsed on back as follows: "#2146. In the matter of the Guthrie claims commission in cases of claims of J. W. McNeal *et al.* *vs.* City of Guthrie. Exceptions to report of referees. Filed April 7th, 1893. Theo. G. Risley, clerk."

And on the seventeenth day of March, A. D. 1893, the Guthrie National Bank filed in said cause a motion in words and figures following, to wit:

15 That thereafter and on the seventeenth day of March, 1893, a written petition and motion was filed by this plaintiff, Guthrie National Bank, in said proceedings in the district court on the report of the said claims commission; which said petition and motion is in the words and figures following, to wit:

"In the District Court of Logan County, Okla. Ter.

In the matter of the referees' report relating to certain claims allowed by them against the City of Guthrie.

GUTHRIE NATIONAL BANK
vs.
THE CITY OF GUTHRIE. } Petition and Motion.

Comes Guthrie National Bank and moves the court to make an order approving the following claims, which were allowed by the referees or commissioners appointed by the judge of said court, and that *nunc pro tunc* entry be made of such order and approval.

This motion is based upon the following facts: "That on the — day of ——, 1892, the claims herein mentioned were by the said commissioners allowed and a report thereof made by the said commissioners to the court herein, as will be seen by the report filed, with certificates of the commissioners attached.

That a full and complete copy of the record made by the commissioners, showing all the claims allowed and disallowed, with their certificate attached, was filed by them in the district court on the — day of ——, 1892, with the original record kept by the commissioners, in which they entered all claims allowed and disallowed; but for some unavoidable circumstance the copy filed with the certificate was lost, and for this reason the court has not entered of record an approval or disapproval of the claims hereinafter described in this motion.

That since the certificate made to the copy of said report referred to has been lost said commissioners, John Foster, chairman,

16 and A. J. Deal, commissioner, have made another certificate, and is entered of record under the claims allowed and disallowed, which are filed in said court as the original record. These claims heretofore referred to and are now owned by the Guthrie National Bank are, first:

Claims based upon warrants issued by the provisional city of Guthrie and allowed by the Guthrie claims commission, to wit:

No. of claims.	No. of warrants.		Amounts allowed.
" 26	" 623	D. T. Flynn....	$25 00
" 35	" 542	J. W. McNeal..	68 75
" 36	" 597	" ..	20 75
" 37	" 962	" ..	30 00
" 38	" 904	" ..	16 00
" 39	" 515	" ..	5 20
" 40	" 400	" ..	39 50
" 41	" 526	" ..	17 50
" 42	" 475	" ..	5 25
" 43	" 448	" ..	18 50
" 44	" 586	" ..	31 75
" 45	" 554	" ..	13 00
" 46	" 547	" ..	4 00
" 47	" 546	" ..	82 49
" 48	" 553	" ..	18 00
" 49	" 549	" ..	18 00
" 50	" 585	" ..	75 00
" 51	" 570	" ..	4 00
" 52	" 336	" ..	10 00
" 53	" 517	" ..	5 00
" 54	" 450	" ..	35 00
" 55	" 614	" ..	52 38
" 91	" 1012	J. J. Graham...	29 50
" 92	" 1014	" ..	3 50
" 93	" 1015	" ..	25 00
" 94	" 1041	T. S. Jones....	75 00
" 95	" 888	D. T. Flynn ...	100 00
" 111	" 1034	" ...	6 67
" 112	" 1030	" ...	25 00
" 113	" 1031	" ...	25 00
" 114	" 1032	" ...	25 00
" 115	" 1033	" ...	25 00
" 116	" 1067	" ...	64 00
" 161	" 960	D. T. Flynn ...	40 00
" 164	" 1019	Harry P. Clark.	22 47
" 195	" 369	John E. Ford..	30 00
" 196	" 370	" ..	120 00
" 197	" 368	" ..	300 00
" 198	" 671	" ..	100 00
" 199	" 712	" ..	100 00
" 200	" 763	" ..	100 00
" 201	" 809	" ..	100 00
" 202	" 830	" ..	100 00
" 203	" 926	" ..	100 00
" 204	" 937	" ..	100 00
" 205	" 971	" ..	100 00
" 206	" 1012	" ..	100 00
" 207	" 1051	" ..	100 00
" 211	" 851	T. S. Jones.....	40 00

17 Second. Claims based upon warrants issued by the provisional city of East Guthrie, which were allowed by the Guthrie claims commission:

No. of claims.	No. of warrants.		
" 18	" 210	P. K. Albert...	$12 25
" 19	" 234	" ...	17 72
" 20	" 282	" ...	19 75
" 21	" 172	" ...	50 00
" 22	" 197	" ...	50 00
" 23	" 262	" ...	50 00
" 24	" 293	" ...	50 00
" 25	" 303	" ...	8 30
" 32	" 106	J. W. McNeal..	7 50
" 33	" 216	" ..	49 50
" 59	" 305	D. T. Flynn ...	40 00
" 150	" 271	Russel Briggs..	2 50
" 151	" 180	" ..	8 00
" 195	" 226	G. H. Lynds...	50 00
" 13	"	John Bingham.	38 00
" 10	" 600	John E. Ford...	600 00

Third. Claims allowed against Capitol Hill:

No. of claims.	No. of warrants.		
" 2	" "	D. T. Flynn...	$12 00

Fourth. Claims based upon warrants issued by the consolidated school district of Guthrie and allowed by the Guthrie claims commission:

No. of claims.	No. of warrants.		
" 11	" 29	J. W. McNeal.....	$9 10
" 12	" 46	"	35 00
" 13	" 65	"	35 00
" 14	" 85	"	35 00
" 24	" 53	Carrie I. Anderson....	21 02
" 25	" 72	"	35 00
" 26	" 84	"	35 00
" 29	" 45	Alma Carson.....	15 40
" 30	" 67	"	35 00
" 31	" 77	"	35 00
" 48	" 82	D. T. Flynn.....	35 00

Total amount of claims allowed against the city of Guthrie and now owned by the Guthrie National bank is.....	2,826 21
Total amount allowed against East Guthrie.....	1,054 02
Total amount against Capitol Hill.....	12 00
Total amount of consolidated school warrants.....	325 52
Amount allowed to Clark as city treasurer.....	97 47
	$4,315 22

These claims have been purchased by Guthrie National Bank; that no part have been paid; therefore it is asked of the
18 court to approve the above and foregoing claims and make the entry as of the date asked for in this motion.

(Signed) DECKER & RAY,
Attorneys for Guthrie National Bank.

This is to certify that the Guthrie claims commission passed on and allowed the following claims in favor of Harry P. Clark for salary as city treasurer under the provisional government of the city of Guthrie:

No. of claims.	No. of warrants.		Amounts allowed.
" 164	"	Harry P. Clark.	$22 47
" 165		.	75 00
Total amount			$4,315 22

Said motion endorsed on the back as follows:
Motion in the matter of claims commission. Guthrie National Bank. Filed March 17, 1893. T. G. Risley, clerk dist. court. Decker & Ray, att'ys for bank."

And which said exceptions and which said motion were continued from time to time and remained undisposed of on the docket of said court until on the twenty-eighth day of March, A. D. 1896, the said City of Guthrie filed in said cause its motion in words and figures following, to wit:

19 In the District Court of Logan County, Oklahoma Territory.

In the matter of the claims against the city of Guthrie contracted by the provisional governments of the cities of East Guthrie, Guthrie, Capitol Hill, West Guthrie, and the Consolidated School District, referred to John Foster, M. D. Losey, and A. J. Deal, including the cases of—

J. W. McNeal *et al.*, Including All Claims Hereinafter Named,
vs.
The City of Guthrie.

Now comes The City of Guthrie, by its attorney, J. L. Pancoast, and moves the court here to dismiss the claims of the plaintiffs herein and all proceedings connected therewith for the reason that the law under which said proceedings were had is null and void.

This motion is made separately as to each and every claim set forth in the list hereto attached and combined in this one motion for convenience only.

(Signed) J. L. PANCOAST,
Att'y for the City of Guthrie.

20 *Claims Based upon Warrants Issued by the Provisional City of Guthrie and Allowed by the Guthrie Claims Commission.*

No. of claim.	No. of warrant.	Present holder.	Principal allowed.
1	900	Dale & Thomas	200 00
2	932	R. S. Reeves	24 65
3	1022	"	11 00
4	806	"	100 00
5	877	"	5 00
6	804	"	23 50
7	905	"	16 00
8	872	"	5 00
16	797	H. C. Shilling	15 75
17	779	Geo. E. Mundy	57 50
18	929	"	20 00
26	623	D. T. Flynn	25 00
28	652	Frank R. Phister, cash	3 00
29	663	"	40 00
31	760	"	19 00
32	771	"	110 00
35	542	J. W. McNeal	68 75
36	507	"	20 75
37	962	"	30 00
38	904	"	16 00
40	400	"	39 50
41	526	"	17 50
39	515	"	5 20
42	475	"	5 25
43	448	"	18 50
44	586	"	31 75
45	554	"	13 00
46	547	"	4 00
47	546	"	82 49
48	553	"	18 00
49	549	"	18 00
50	585	"	75 00
51	570	"	4 00
52	336	"	10 00
53	517	"	5 00
54	450	"	35 00
55	614	"	252 38
56	603	"	75 00
57	698	"	38 95
58	587	"	3 25
59	704	"	38 25
60	982	"	7 03

Claims Based upon Warrants, &c.—Continued.

No. of claim.	No of warrant.	Present holder.	Principal allowed.
61	305	E. D. Nix, rec'v	64 92
62	959	"	50 00
63	527	"	3 00
64	645	"	3 00
65	834	"	10 00
66	599	"	50 00
67	961	"	40 00
68	873	"	5 00
69	863	"	5 00
70	680	"	148 56
71	691	"	75 00
72	720	"	35 00
21			
73	552	E. D. Nix, rec'v	35 00
74	584	"	60 00
75	802	"	81 67
76	575	"	6 90
77	604	"	35 00
78	588	"	25 00
79	765	"	35 00
80	1042	E. P. Kelly	10 00
81	1045	"	10 00
82	1048	"	15 00
83	1046	"	10 00
84	1043	"	10 00
85	1070	"	8 65
86	964	"	9 50
87	1044	"	10 00
88	1047	"	10 00
89	842	"	10 00
90	894	"	16 15
91	1019	J. J. Graham	29 50
92	1014	"	3 00
93	1015	"	25 00
94	1041	"	75 00
96	666	E. R. Darlington	11 55
97	953	Henry Linn	40 65
101	853	A. M. McElhinney	7 50
102	860	A. H. Waite	10 00
103	859	"	10 00
104	867	"	5 00
105	869	"	5 00

Claims Based upon Warrants, &c.—Continued.

No. of claim.	No. of warrant.	Present holder.	Principal allowed.
106	868	A. H. Waite	5 00
107	864	"	5 00
108	777	"	2 00
109	1026	Harry McDanell	4 50
110	721	B. F. Harriman	6 00
111	1034	D. T. Flynn	6 67
112	1030	"	25 00
113	1031	"	25 00
114	1032	"	25 00
115	1033	"	25 00
116	1067	"	64 00
117	854	Geo. E. Gray	10 00
118	883	Robert W. Hill	100 00
119	1035	James Dooley	16 00
120	979	M. Collar	35 25
121	767	Roy V. Hoffman	30 00
122	817	H. S. Smith	87 00
123	595	F. B. Lillie	12 75
135	1061	L. Kreig	4 00
136	773	A. G. Herron	26 00
137	988	G. C. McCord	23 00
138	1004	Daily News Co	6 00
139	1029	"	8 00
141	911	Wm. Blincoe	16 00
142	606	J. C. Shelton	75 00
143	504	"	68 00
144	744	"	55 00
145	849	D. S. McKay,	10 00
146	630	Barr Bros	1 75
147	859	"	20 37
148	682	"	21 80
149	974	James McConnell	12 00
22			
150	951	James McConnell	4 50
151	826	John C. Tutt	12 75
154	762	"	4 05
155	707	"	11 20
156	631	James P. Millen	14 40
158	594	"	9 00
159	674	Geo. Cunningham	1 50
160	960	D. T. Flynn	17 50
161	1059	L. J. Hiatt	40 00

Claims Based upon Warrants, &c.—Continued.

No. of claim.	No of warrant.	Present holder.	Principal allowed.
162	1068	Wm. Plagg	8 00
163	1010	Harry P. Clark	80
164	1071	"	22 47
165	1021	—— Schnell	75 00
166	1053	C. Van Meter	16 00
167	784	Jno. M. Hale	8 25
174	1036	"	75
175	1057	"	5 00
176	513	A. J. Spengel	8 95
177	848	"	2 50
178	1027	"	10 00
179	858	J. Smalley	6 00
180	737	J. N. Coulter	10 00
181	739	"	25 52
182	681	J. C. Sellars	18 25
183	839	E. P. Kelley	8 60
188	1024	Jas. Blokerler	2 10
189	386	John Stein	4 50
190	862	Geo. Kenden	1 00
191	870	"	5 00
192	928	"	5 00
193	369	John E. Ford	20 00
195	370	"	30 00
196	368	"	120 00
197	671	"	300 00
198	712	"	100 00
199	763	"	100 00
200	809	"	100 00
201	830	"	100 00
202	926	"	100 00
203	937	"	100 00
204	971	"	100 00
205	1012	"	100 00
206	1051	"	100 00
207	945	Harry A. Decker	100 00
208	990	Geo. W. Crane	6 00
209	851	Thos. S. Jones	25 00
211	316	S. L. Overstreet	40 00
215	686	John H. Piburn	15 65
216	816	Mrs. F. Stone	14 50
217	1065	J. P. Barton	17 79
218	661	F. M. Jay	15 00
219	850	C. W. Goodrich	2 00

Claims Based upon Warrants, &c.—Continued.

No. of claim.	No. of warrant.	Present holder.	Principal allowed.
220	1016	Wm. Ragland	5 00
221	647	W. J. Brodfoot	2 00
222	648	E. P. Kelley	3 00
227	770	"	3 00
228	921	"	3 80
229	801	G. F. Harriett	2 90
231	827	"	35 00
232	886	"	35 00
233	884	"	5 00
23			
234	884	G. F. Harriett	17 50
235	909	"	16 00
236	618	S. E. Caylor	25 00
237	808	"	25 00
238	717	"	25 00
239	543	F. E. Marion	10 00
240	463	E. D. Nix, rec'v	76 00
241	464	"	47 50
242	590	"	2 50
243	619	"	52 50
244	1013	Amos Stealey	100 00
246	350	E. P. Kelly	15 80
247	540	"	4 00
248	639	"	50
249	772	"	16 30
250	840	"	5 00
251	678	M. A. Baxter	50 00
252	831	Benjamin Strauss	10 50
253	890	"	5 00

Claims not Based upon Warrants Filed Against the Provisional City of Guthrie and Allowed by the Guthrie Claims Commission.

No. of claim.	Basis of claim.	Present holder.	Principal allowed.
1	Blank books	Wichita Eagle Co	$206 00
2		J. W. Perkins	38 00
5	Noble Ave. bridge	Allen Murry	389 70
7	50 feet hose	Mineralized Rubber Co	27 50

Claims not Based upon Warrants, &c.—Continued.

No. of claim.	Basis of claim.	Present holder.	Principal allowed.
8	3¼ days civ. eng.....	H. L. Jackson.....	$26 25
11	Labor & material.....	Jeptha Sturgeon.....	18 62
12	Legal services.....	N. B. Maxey.....	25 00
14	.....	W. W. Crooks.....	23 00
16	Lost warrant.....	J. N. Wallace.....	16 20
17	"	"	14 60
18	"	"	14 95
20	Hotel rental.....	J. M. Block (Brooks).....	4 00
22	Labor.....	Joseph Mooney.....	6 62
24	.....	F. A. Pauperin.....	11 00
26	Medel, services.....	Chas. Sweet, Ms.....	16 00
27	Lost warrant.....	Ed. S. Joyce.....	65 00
29	"	P. A. Jaring.....	55 00
30	"	W. H. Fallis.....	15 00
31	Wire nail-.....	C. H. Stowe.....	16 75
32	Police judge, salary..	S. M. Decker.....	75 00

24 *Claims not Based upon Warrants Filed Against the City of Guthrie and Disallowed by the Guthrie Claims Commission.*

No. of claim.	Basis of claim.	Present holder.	
1	Blank books.....	Wichita Eagle Co.....	66 00
2	Chu. b'd arb't.....	J. W. Perkins.....	202 00
3	Civil eng.....	J. V. Brieren.....	88 00
4	Forfeiture.....	John H. Onstate.....	1,100 00
5	Noble Ave. bridge....	Allen Murry.....	680 00
6	Member b'd arb't....	J. C. Jamison.....	207 00
10	Chr. b'd arb't.....	C. C. Snyder.....	230 00
12	Legal services.....	N. B. Maxey.....	75 00
13	Care & board of sick..	Martin B. Emery.....	84 00
14	Member b'd arb't....	W. M. Crooks.....	207 00
15	Cr. & b'd of sick.....	Martin B. Emery.....	64 00
19	Member b'd arb't No. 1	John T. Hill.....	130 00
21	Typewriting.....	Roy V. Hoffman.....	20 00
24	Member b'd arb't....	T. A. Pauperin.....	99 00
25	Damages.....	Abraham J. Greiner.....	5,000 00
28	Juryman.....	S. J. Seeds.....	6 00
32	Sal. as police judge...	S. M. Decker.....	50 00

Warrants Filed Against the City of Guthrie and Disallowed by the Guthrie Claims Commission.

No. of claim.	No. of warrant.	Present holder.	Principal allowed.
153	820	A. G. Crockett	$10 00
184	1005	T. A. McCaudless	48 80
245	1052	Amos Stealey	35 00

25 *Claims Based upon Warrants Issued by the Provisional City of East Guthrie and Disallowed by the Guthrie Claims Commission.*

No. of claim.	No. of warrant.	Present holder.	Principal allowed.
3	228	Frank Greer	18 12
4	304	"	6 40
5	140	"	31 25
8	223	Frank Gebke	2 00
9	149	"	6 65
10	169	John A. Rodgers	50 00
18	210	P. K. Albert	12 25
19	234	"	17 72
20	282	"	19 75
21	172	"	50 00
22	197	"	50 00
23	262	"	50 00
24	293	"	50 00
25	303	"	8 30
27	290	A. F. Pentecost	6 00
32	106	J. W. McNeal	7 50
33	216	"	49 50
34	211	E. D. Nix, rec'v	50 00

Claims Based upon Warrants Issued by the Provisional City of Guthrie and Allowed by the Guthrie Claims Commission.

No. of claim.	No. of warrant.	Present holder.	Principal allowed.
48	272	Hila W. Smith	$5 00
49	294	C. W. Stowe	6 00
50	263	C. W. Smith	2 50
51	267	"	6 00
52	170	C. F. Eisenschmidt	60
53	175	"	33 33
54	196	"	33 33
55	199	"	2 00
56	284	"	10 00
58	225	A. H. Waite	12 00
59	305	D. T. Flynn	40 00
60	253	John Taylor	3 00
61	204	"	2 50
63	301	G. O. Coleman	7 00
64	222	J. H. Hamilton	38 00
65	223	"	10 50
70	244	Roy V. Hoffman	5 00
71	247	"	5 00
73	282	D. Woolf	7 00
74	283	J. E. McCon	9 00
75	212	Charles Filtsch	50 00
129	240	Thos. McPherson, V.-P.	24 00
131	201	"	25 00
26			
143	176	W. G. Miller	6 00
144	285	"	10 00
145	153	James H. Bullen	251 75
146	286	A. H. Meal	10 00
147	231	"	2 00
148	214	John Engler	2 00
149	259	Geo. D. Orput	3 00
150	271	Russel Briggs	2 50
151	180	"	8 00
157	184	A. J. Spengel	10 00
158	284	F. A. Stewart	2 50
159	182	Anna E. Humphrey	8 00
170	193	Frank R. Phister, cash	10 00
171	141	L. B. Shapland	7 93
172	246	"	5 00
173	248	"	5 00
174	249	"	5 00

Claims Based upon Warrants, &c.—Continued.

No. of claim.	No. of warrant.	Present holder.	Principal allowed.
175	255	"	$3 00
176	256	"	3 00
177	257	"	3 00
178	207	Leonard & Co	5 00
179	218	"	7 00
180	220	John E. Ford	40 00
181	205	M. B. Williams	2 50
182	297	A. C. Schnell	5 00
183	295	"	3 00
184	224	P. R. Salmon	3 00
185	250	"	3 00
186	261	"	3 67
190	183	F. M. Rhinehart	10 00
194	192	E. W. Wray	10 00
195	226	G. H. Lynds	50 00
197	163	A. C. Schnell	2 50
198	146	"	10 50
200	166	H. C. Speer	16 50
201	167	"	269 50
202	236	"	14 50
203	242	"	18 00
204	206	"	60 00
206	181	L. H. Blackburn	8 00
221	202	J. A. Cooper	3 75
222	207	"	18 00
223	235	"	30 75
224	238		18 00

Claims Based upon Warrants Issued by the City of East Guthrie and Disallowed by the Guthrie Claims Commission.

No. of claim.	No. of warrant.	Present holder.	
1	21	J. W. Howell	75 00
2	22	"	75 00
29	234	Geo. Colton	50 00
31	291	"	22 05
43	279	H. F. Ardery	62 81
66	139	Rec'd am't Nat'l Bank Akaj	39 00
67	192	" " "	37 50

Claims Based upon Warrants, &c.—Continued.

No. of claim.	No. of warrant.	Present holder.	
27 & 28			
68	230	Rec'd am't Nat'l Bank Akaj.....	45 00
69	216	" " "	40 25
78	218	Z. Provolt.....	15 00
42	211	H. F. Ardery.....	1 00
152	118	Thos. McPherson, V.-P.....	78 00
153	245	"	40 25
191	193	R. L. Wilson	37 50
192	228	"	45 00
193	221	Geo. W. Taylor	15 00
220	214	H. H. Moore....	5 00
221	202	J. A. Cooper.....	1 25
222	207	"	6 00
223	255	"	10 25
224	238	"	6 00

Claims not Based upon Warrants Filed Against the City of East Guthrie and Allowed by the Guthrie Claims Commission.

No. of claim.	Basis of claim.	Present holder.	Am't allowed.
3	Labor	W. A. R. White	7 50
4	"	"	13 75
5	Lumber.....	F. E. Pentecost, ag't.	55 10
6	Civil engineering	O. A. Clark	24 00
7	Money paid	A. H. Meal.....	25
8	Legal services.....	Charles Brown	130 00
10	Water rent.....	John E. Ford.....	600 00
11	Electric light.....	E. W. Wray..... ..	10 00
12	Sec. charter com.... ..	W. G. Friedly.....	63 00
13	Work and labor.....	John Bingham.....	38 50
15	Member charter com...	J. K. Johnson.....	40 00
16	" " "	John A. Gilbert	40 00
17	" " "	C. W. Smith.....	40 00
18	" " "	W. G. Miller.....	40 00
19	" " "	H. D. Todd	40 00
20	" " "	Geo. W. Alexander ..	15 50
22	Lgt. at and the Co.....	D. Nelsin.....	40 00
23	Mayor's salary.....	T. H. Soward	46 65

Claims not Based upon Warrants Filed Against the City of East Guthrie and Disallowed by the Guthrie Claims Commission.

No. of claim.	Basis of claim.	Present holder.	
1	Printing	Wichita Eagle	66 00
2	Contest loan	Hila W. Smith	3 00
8	Legal services	Chas. Brown	145 00
9	Cash advanced	L. J. Kalklasch	33 42
10	Water rent	John E. Ford	1,080 00
13	Labor	John Bingham	10 00
14	Member charter com.	J. R. Axsom	13 50
15	" " "	T. K. Johnson	13 50

29 *Claims Based upon Warrants Issued by the Consolidated School District of Guthrie and Allowed by the Guthrie Claims Commission.*

No. of claim.	No. of warrant.	Present holder.	Principal allowed.
1	54	C. C. Mills	2 62
2	43	"	60 00
3	92	"	5 45
4	87	Frank Greer	3 00
11	29	J. W. McNeal	9 10
12	46	"	35 00
13	65	"	35 00
14	85	"	35 00
15	15	E. D. Nix, rec.	5 62
16	16	"	4 84
20	68	A. S. Wehmeier	35 00
21	70	L. L. Patten	35 00
24	73	Carry I. Anderson	21 02
25	72	"	35 00
26	84	"	35 00
27	51	H. L. Smut	24 00
28	79	"	8 75
29	45	Alma Carson	15 40
30	67	"	35 00
31	77	"	35 00
32	32611	J. W. McNeal	952 69
33	32025	"	1,262 60
34	32613	"	64 02

Claims Based upon Warrants, &c.—Continued.

No. of claim.	No of warrant.	Present holder.	Principal allowed.
35	Claim.	M. Collar	10 00
36	50	Harry A. Decker	29 40
37	66		35 00
38	78		35 00
39	No number.	J. W. McNeal, ag't	76 50
40	5	"	85 00
41	41	Geo. Kendall	23 62
42	49	G. H. Lynds	30 40
43	12	J. W. McNeal	33 86
44	1	"	28 49
45	55	W. Sumpkin	5 25
46	80	"	26 25
47	57	Linnie Cook	9 00
48	82	D. T. Flynn	35 00
49	36	E. P. Kelly	8 75

Claims Based upon Interest on Warrants and Failure to Cr. Payments Issued by the G. C. S. D. and Disallowed by the Guthrie Claims Commission.

No. of claim.	No. of warrant.	Present holder.	Principal allowed.
32	32611	J. W. McNeal	85 74
33	32025	"	113 65
34	32613	"	5 76
35	Claim.	M. Collar	31 00

30 Said motion to dismiss is endorsed on the back as follows: 2146. In the district court of Logan county. J. W. McNeal *et al. vs.* The City of Guthrie. Motion to dismiss. Filed Mar. 28, 1896. Louis E. Pitts, clerk dist. court. J. L. Pancoast, for the City of Guthrie.

And thereafter and on the second day of April, A. D. 1896, said cause came on to be heard before the court on the said motion of the said Guthrie National Bank, the said exceptions of the City of

Guthrie, and the said motion to dismiss, and the court first heard said cause on the said motion to dismiss all of the proceedings in said cause upon the grounds stated in said motion, filed, as aforesaid, on the twenty-eighth day of March, 1896, and the court, after hearing the argument in behalf of said city and in behalf of the said Guthrie National Bank, sustained said motion to dismiss all of such proceedings for the grounds stated in said motion, to wit, because and for the reason the law under which said commission was appointed and under which they acted in adjudicating and determining the amount of the said various claims and in charging the same against the said City of Guthrie and all proceedings had under said law were null and void by reason of the invalidity of such law.

To which said rulings the said Guthrie National Bank, as one of the claimants under said proceedings, duly excepted and excepts, and the court refused, by reason of the dismissal of the said case, to consider the exceptions to said report or the petition of the Guthrie National Bank for the confirmation of said report on the claims claimed to be owned by the said Guthrie National Bank.

To all of which rulings and orders the said Guthrie National Bank duly excepted and excepts, and the court entered its proceedings on the journal of said court in the following words and figures, to wit:

31 THE GUTHRIE NATIONAL BANK *against* THE CITY OF GUTHRIE *et al.* } # 2146.

APRIL 2, 1896.

Now, at this time, the above cause is called on motion to dismiss the claims sued on in this case. Motion sustained. (Plaintiff excepts.) As to all claims, excepting claim number four of John H. Onstott for $1,000, plaintiff given sixty days in which to make and serve a case-made for the supreme court; defendants given ten days in which to suggest amendments; case-made to be signed and settled on five days' notice, to be given by either party.

And afterwards and on, to wit, the 30th day of May, A. D. 1896, the following order was made in said cause:

THE GUTHRIE NATIONAL BANK *against* THE CITY OF GUTHRIE *et al.* } # 2146.

MAY 30, 1896.

Now, on this 30th day of May, A. D. 1896, after considering the application of the plaintiff and finding the facts therein set forth to be true and sufficient, it is ordered by the court and the judge thereof that the application of the plaintiff be, and the same is hereby, granted, and it is ordered that the time to make and serve a case-made be, and is hereby, extended until the first day of July, 1896, and that the defendants have and are granted ten days there-

after in which to suggest amendments thereto, and said case-made to be settled on written notice of five days thereafter.

(Signed) FRANK DALE, *Judge.*

Filed May 30, 1896.

LOUIS E. PITTS,
Clerk Dist. Court.

32 And afterwards and on, to wit, the 30th day of June, A. D. 1896, the following order was made in this cause, to wit:

THE GUTHRIE NATIONAL BANK, a Corporation, Plaintiff,
against
THE CITY OF GUTHRIE, EAST GUTHRIE, West Guthrie, Capitol Hill, and The Consolidated School Township Thereof, Defendants.
} # 2146. Order Extending Time to Make and Serve Case-made.

Now, on this 30th day of June, A. D. 1896, at my office in chambers, in the court-house, in the city of Guthrie, Logan county, Oklahoma Territory, after due consideration of the application of the plaintiff this day made for an order extending the time to make and serve a case-made for the supreme court, I find that the facts set forth in said application are true, and that the prayer of the applicant should be granted upon the showing made. It is therefore ordered and the time is hereby granted to make and serve said case-made until the first day of August, 1896.

(Signed) FRANK DALE, *Judge.*

Filed July first, 1896.

LOUIS E. PITTS,
Clerk Dist. Court.

And afterwards and on, to wit, the 28th day of July, A. D. 1896, the following order was made in said cause, to wit:

GUTHRIE NATIONAL BANK, a Corporation, Plaintiff,
against
EAST GUTHRIE *at al.*, Defendants.
} # 2146.

Now, on this 28th day of July, A. D. 1896, upon the foregoing showing, it is hereby ordered by me, the undersigned, judge of said court, that the prayer of the plaintiff be, and the same is hereby, granted, and that the time to make and serve a case-made
33 for the supreme court in the above-entitled cause is hereby extended until the first day of September, A. D. 1896, and that the defendants have ten days thereafter to suggest amendments,

and the same to be settled upon five days' notice in writing to the opposite party.

(Signed) FRANK DALE, *Judge.*

Filed July 31st, 1896.

LOUIS E. PITTS,
Clerk Dist. Court.

The above and foregoing case-made contains all of the matters material to present the question sought to be reviewed in this case and complained of by the Guthrie National Bank.

Service of the above and foregoing case-made hereby acknowledged this twenty-ninth day of August, A. D. 1896, and after having carefully examined the same I find the same to be a true and correct representation of what the said case-made purports to contain, and hereby waive the suggestion of any amendments and consent that the same may be signed and settled at any time.

BAYARD T. HAINER,
City Attorney.

34 TERRITORY OF OKLAHOMA, } ss:
Logan County, }

And now, on this twenty-ninth day of March, A. D. 1897, the above and foregoing case-made is presented to me for signing and settlement, and I find the same has been duly served within the time limited by the orders of the court, and that notice of the presentation of the same for signing and settlement has been duly waived, and after having carefully examined the said case-made I find the same to be true and correct for what it purports on its face to show, and the same is by me hereby signed and settled as the case-made in said case, and the clerk of said court is hereby ordered to attest the same and file the same among the papers in said cause.

FRANK DALE,
Judge of the District Court of Logan County, Oklahoma.

Attest: LOUIS E. PITTS,
Clerk of the District Court of Logan County, Oklahoma.
[SEAL.] ALFRED S. DE WITT, *Deputy.*

Filed this twenty-ninth day of March, A. D. 1897.

LOUIS E. PITTS,
Clerk of the District Court of Logan County, Oklahoma.
ALFRED S. DE WITT, *Deputy.*

Endorsed: Filed March 29, 1897. Edgar W. Jones, clerk supreme court.

35 And be it further remembered that on the twenty-ninth day of March, A. D. 1897, there was filed in said cause a præcipe for summons in error in words and figures following, to wit:

36 In the Supreme Court of the Territory of Oklahoma.

THE GUTHRIE NATIONAL BANK, Plaintiff in Error,
against
THE CITY OF GUTHRIE, Defendant in Error.
} Præcipe for Summons.

The clerk of this court will please issue summons in error in this cause, direct- to the sheriff of the county of Logan and Territory — and returnable according to law, for B. T. Hainer, city attorney of the city of Guthrie, and A. O. Farquaharson, mayor of the city of Guthrie.

ASP, SHARTEL & COTTINGHAM,
Attorneys for Plaintiff in Error.

Endorsed: Supreme court. Guthrie National Bank *vs.* City of Guthrie. Præcipe for summons. Filed March 29th, 1897. Edgar W. Jones, clerk supreme court.

37 Be it further remembered that on the twenty-ninth day of March, A. D. 1897, there was issued out of said court a summons in error, which, together with the endorsements thereon, is in words and figures following, to wit:

38 TERRITORY OF OKLAHOMA, } ss:
Supreme Court, }

The Territory of Oklahoma to the sheriff of Logan county, Greeting:

You are hereby commanded to notify The City of Guthrie, by B. T. Hainer, city attorney, and A. O. Farquaharson, mayor, defendant in error, that The Guthrie National Bank, plaintiff in error, did, on the 29th day of March, A. D. 1897, file in the clerk's office of the supreme court of Oklahoma Territory a petition in error and transcript of record or case-made, the object of which is to obtain a reversal of a certain judgment rendered by the district court sitting within and for the county of Logan and Territory of Oklahoma in an action pending before said court wherein the said plaintiff in error was plaintiff and the said defendant in error was defendant.

You will make due return of this summons in error on or before the 19th day of April, A. D. 1897.

Witness my hand and the seal of the supreme court affixed hereto, at my office, in Guthrie, this 29th day of March, A. D. 1897.

EDGAR W. JONES,
Clerk Supreme Court,
[SEAL.] By OLGA SCRUTCHFIELD, *Deputy.*

Sheriff's Return.

TERRITORY OF OKLAHOMA, } ss:
County of Logan, }

I received this summons in error on the 19th day of March, 1897, at 11 o'clock a. m., and served the same on the 19th day of March,

1897, by delivering a true and certified copy of the within summons in error, in Logan county, to B. T. Hainer and A. O. Farquaharson.

39 F. M. RINEHART, *Sheriff*,
By C. E. CARPENTER, *Deputy*.

Fees.

Service	50
One ad	25
Two copies	50
	$1 25

Endorsed: No. 565. Supreme court, Territory of Oklahoma. The Guthrie National Bank *vs.* The City of Guthrie. Summons in error. Issued March 29th, 1897. Returnable Apr. 19th, 1897. Returned and filed April 1st, 1897. Edgar W. Jones, clerk supreme court.

40 And afterwards and on the eleventh day of June, A. D. 1897, a certain judgment and order was entered on the journals of the said supreme court of the Territory of Oklahoma in words and figures following, to wit:

41 THE GUTHRIE NATIONAL BANK, Plaintiff in Error,
against
THE CITY OF GUTHRIE, Defendant in Error. } Journal Entry.

Now, on this eleventh day of June, A. D. 1897, said cause came on for trial in its regular order, the plaintiff in error appearing by its attorney, John W. Shartel, Esq., and the defendant in error appearing by Bayard T. Hainer, Esq., city attorney; and

Thereupon said cause is submitted to the consideration of the court, and it appearing to the court, upon an examination of the record, that the only question involved in said cause is the validity and constitutionality of article one of chapter thirteen of the Revised Statutes of Oklahoma Territory of the year 1893, upon which this court, on full consideration, in the cases of Bank *vs.* McElhinney, No. 123, and Martin *vs.* Gray, receiver, No. 358, have heretofore affirmed the proposition that the said statute is unconstitutional and void and all proceedings taken thereunder are null and void, and the court below having ruled in accordance with said decisions in making the ruling complained of, this cause is affirmed on the authority of the foregoing decision of this court; to which judgment of affirmance the plaintiff in error duly excepted and excepts.

It is therefore adjudged by the court that the plaintiff in error take nothing by its petition in error, and that the defendant in error recover the costs of this proceeding, taxed at — dollars; to which judgment the plaintiff in error duly excepted and excepts.

Endorsed: The Guthrie National Bank *vs.* The City of Guthrie. Journal entry. Filed June 11th, 1897. Edgar W. Jones, clerk supreme court.

42 And afterwards, on the eleventh day of June, A. D. 1897, there was filed in said cause a petition for a writ of error; which said petition for a writ of error is in words and figures following, to wit:

43 In the Supreme Court of the Territory of Oklahoma.

THE GUTHRIE NATIONAL BANK, Plaintiff in Error,
against
THE CITY OF GUTHRIE, Defendant in Error. } Number 565.

Assignment of errors at law.

Petition for a Writ of Error.

Comes now the plaintiff in error, The Guthrie National Bank, and says that herein and on the 11th day of June, A. D. 1891, this court entered judgment herein in favor of the defendant in error and against this plaintiff in error, affirming the decision and judgment of the court below and rendering judgment against the said plaintiff in error for the costs of this proceeding in error, in which judgment and proceedings had prior thereto in the court below, affirmed by the judgment of this court in this cause, certain errors were committed to the prejudice of this plaintiff in error; all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff in error prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

The said plaintiff in error further in this behalf shows that the amount in controversy in this cause, exclusive of costs, exceeds the sum or amount of five thousand dollars.

ASP, SHARTEL & COTTINGHAM,
Attorneys for Plaintiff in Error.

44 TERRITORY OF OKLAHOMA, } ss:
County of Logan,

John W. Shartel, being first duly sworn, on his oath deposes and says—

That he is one of the attorneys for the plaintiff in error; that he is familiar with the controversy involved in this cause, and knows the amount at issue therein and involved therein and of controversy therein, and knows the amount in controversy in said cause, exclusive of costs, to exceed the sum of five thousand dollars.

JOHN W. SHARTEL.

Subscribed in my presence and sworn to before me this 11th day of June, A. D. 1897.

ELIZABETH PARSONS,
[SEAL.] *Notary Public.*

My commission expires Jan. 20, 1901.

Endorsed: In the supreme court of Oklahoma Territory. The Guthrie National Bank *vs.* The City of Guthrie. Petition for writ of error. Filed June 11th, 1897. Edgar W. Jones, clerk supreme court.

45 And afterwards and on the eleventh day of June, A. D. 1897, there was filed in said cause an assignment of errors in words and figures following, to wit:

46 In the Supreme Court of the Territory of Oklahoma.

THE GUTHRIE NATIONAL BANK, Plaintiff in Error,
against
THE CITY OF GUTHRIE, Defendant in Error.

The plaintiff in error in this action, in connection with *his* petition for a writ of error, makes the following assignment of errors, which *he* avers occurred upon the trial of this cause, to wit:

First. The court erred in affirming the judgment of the court below.

Second. The court erred in holding as a matter of law that the act of the territorial Legislative Assembly of the 25th day of December, A. D. 1890, being entitled "An act for the purpose of providing for the allowance and payment of the indebtedness heretofore created by the people and cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, now consolidated into the village of Guthrie," and being article one of chapter fourteen of the Revised Statutes of said Territory of the year 1891, to be unconstitutional and void.

Third. The court erred in holding that the proceedings had in the district court of the county of Logan and Territory of Oklahoma exhibited in the record in this cause, whereby certain commissioners were appointed for the purpose of auditing and allowing said indebtedness, were null and void.

Fourth. The court erred in the affirmance of the judgment of the district court of the county of Logan, in said Territory, dismissing said proceedings.

Fifth. The court erred in the rendition of its judgment of affirmance in said cause and of that part of said judgment taxing
47 the costs of this proceeding in error to the said plaintiff in error.

All of which errors fully appear and are duly excepted to in the record in said cause.

ASP, SHARTEL & COTTINGHAM,
Attorneys for Plaintiff in Error.

Endorsed: In the supreme court of Oklahoma Territory. The Guthrie National Bank *vs.* The City of Guthrie. Assignment of errors. Filed June 11th, 1897. Edgar W. Jones, clerk supreme court.

48 And on the said eleventh day of June, A. D. 1897, a certain order was entered on the journal of the supreme court of the Territory of Oklahoma in said cause in words and figures following, to wit:

49 THE GUTHRIE NATIONAL BANK, Plaintiff in Error,
against
THE CITY OF GUTHRIE, Defendant in Error. } No. 565.

Now, on this eleventh day of June, A. D. 1897, comes the plaintiff in error, by Mr. John Shartel, its attorney, and filed herein and presented to the court its petition, praying for the allowance of a writ of error intended to be urged by the plaintiff in error, and also files herewith *his* assignment of errors, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises; on consideration whereof the court does allow the writ of error upon the plaintiff in error giving bond, according to law, in the sum of two hundred dollars, which shall operate as a supersedeas bond.

Endorsed: The Guthrie National Bank *vs.* The City of Guthrie. Journal entry. Filed June 11th, 1897. Edgar W. Jones, clerk supreme court.

50 And afterwards and on the eleventh day of June, A. D. 1897, there was deposited in the office of the clerk of the supreme court of the Territory of Oklahoma a writ of error and copy thereof; which said writ of error and copy is in words and figures following, to wit:

51 UNITED STATES OF AMERICA, } *ss*:
Eighth Judicial Circuit, Territory of Oklahoma,

The President of the United States to the honorable judges and clerk of the supreme court of the Territory of Oklahoma:

Because in the record of proceedings, as also in the rendition of the judgment of a plea which is in said court upon a petition in error, before you, wherein The Guthrie National Bank is plaintiff in error and The City of Guthrie is defendant in error, which said judgment was rendered as a judgment of affirmance of the judgment of the district court of the county of Logan and Territory of Oklahoma, complained of in your court by such petition in error, a manifest error hath happened, to the great damage of the said The Guthrie National Bank, plaintiff in error, as by its complaint and its assignment of errors appears, we, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, in the city of Wash-

ington, together with this writ, so that you have the same at the office of the clerk of said Supreme Court of the United States, at the city of Washington, on the 11th day of July, A. D. 1897, next, in the said Supreme Court of the United States to be then and there held, and that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein and to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 11th day of June, A. D. one thousand eight
52 hundred and ninety-seven, in the one hundred twenty-second year of the Independence of the United States of America.

Allowed in open court.

FRANK DALE,
Chief Justice of the Territory of Oklahoma.

Attest: EDGAR W. JONES,
Clerk of the Supreme Court
[SEAL.] *of the Territory of Oklahoma.*

Endorsed: In the supreme court of Oklahoma Territory. The Guthrie National Bank *vs.* The City of Guthrie. Writ of error. Filed June 11th, 1897. Edgar W. Jones, clerk supreme court.

53 And on the eleventh day of June, A. D. 1897, there was issued, returned, and filed in the office of said clerk of the supreme court of the Territory of Oklahoma a citation in words and figures following, to wit:

54 UNITED STATES OF AMERICA, } *ss:*
Eighth Judicial District, Territory of Oklahoma, }

To the City of Guthrie, in said Territory, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States of America, to be holden at the city of Washington, on the 11th day of July next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Oklahoma, wherein The Guthrie National Bank is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error prayed, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eleventh day of July, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred twenty-second.

FRANK DALE,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

[SEAL.] Attest: EDGAR W. JONES, *Clerk.*

I hereby accept due personal service of this citation on behalf of The City of Guthrie, the defendant in error above named, this eleventh day of June, A. D. 1897.

BAYARD T. HAINER,
City Attorney of The City of Guthrie and Attorney for said Defendant in Error in said Cause.

Endorsed: Supreme court of Oklahoma Territory. The Guthrie National Bank *vs.* The City of Guthrie. Citation. Filed June 12th, 1897. Edgar W. Jones, clerk supreme court.

55 And on the said eleventh day of June, A. D. 1897, there was filed in the office of the clerk of the supreme court of said Territory a bond in supersedeas in words and figures following, to wit:

56 In the Supreme Court of the Territory of Oklahoma.

THE GUTHRIE NATIONAL BANK, Plaintiff in Error,
against
THE CITY OF GUTHRIE, Defendant in Error. } Supersedeas Bond.

Know all men by these presents that we, The Guthrie National Bank, as principal, and J. W. McNeal and W. J. Horsfall, as sureties, are held and firmly bound unto the defendant in error, The City of Guthrie, in the full and just sum of two hundred dollars ($200.00), to be paid to the said City of Guthrie, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, successors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eleventh day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a session of the supreme court of the Territory of Oklahoma, holden at the city of Guthrie, in said Territory, and in a suit pending in said court between The Guthrie National Bank, plaintiff in error, and The City of Guthrie, defendant in error, a judgment was rendered against the said Guthrie National Bank and in favor of the said defendant in error affirming a certain judgment of the district court of the county of Logan and Territory of Oklahoma and adjudging the plaintiff in error to pay the costs of the said proceeding in the supreme court of the Territory of Oklahoma, as aforesaid, and the said Guthrie National Bank having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the supposed suit, and a citation directed to the said City of Guthrie, citing and admonishing it to be and appear at a session of the Supreme Court of the United States of America, to be holden at the city of Washington, on the 11th day of July next:

57 Now, the condition of the above obligation is such that if the said Guthrie National Bank shall prosecute said writ of error to effect and answer all damages and costs if they fail to make

said plea good, then the above obligation to be void; else to remain in full force and effect.

THE GUTHRIE NATIONAL BANK.
J. W. McNEAL.
W. J. HORSFALL.

Approved by—
FRANK DALE,
Chief Justice.

Endorsed: In the Supreme court of Oklahoma Territory. The Guthrie National Bank *vs.* The City of Guthrie. Supersedeas bond. Filed June 11th, 1897. Edgar W. Jones, clerk supreme court.

58 And afterwards and on the twelfth day of June, A. D. 1897, there was filed in the office of the clerk of the supreme court of the Territory of Oklahoma a statement on appeal, together with the allowance thereof, in the words and figures following, to wit:

59 In the Supreme Court of the Territory of Oklahoma.

THE GUTHRIE NATIONAL BANK, Plaintiff in Error,
against
THE CITY OF GUTHRIE, Defendant in Error. } No. 565.

The above-named plaintiff in error, conceiving itself aggrieved by the judgment entered in this cause on the 11th day of June, A. D. 1897, does hereby appeal from the said order and judgment of affirmance of the judgment of the district court of the county of Logan and Territory of Oklahoma to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith and hereto attached, and it prays that its appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States Supreme Court.

Dated this 12th day of June, A. D. 1897.

ASP, SHARTEL & COTTINGHAM,
Attorneys for Plaintiff in Error.

TERRITORY OF OKLAHOMA, } ss:
County of Logan, }

John W. Shartel, being first duly sworn, on his oath deposes and says—

That he is one of the attorneys for the appellant: that he is familiar with the controversy involved in this cause, and knows the amount at issue therein and involved therein and of controversy therein, and knows the amount in controversy in said cause, exclusive of costs, to exceed the sum of five thousand dollars.

JOHN W SHARTEL.

Subscribed in my presence and sworn to before me this 12th day of June, A. D. 1897.

EDGAR W. JONES,
[SEAL.] *Clerk Supreme Court.*

60 The foregoing claim of appeal is allowed in open court by order of the supreme court of the Territory of Oklahoma this 12th day of June, A. D. 1897.

Attest: FRANK DALE,
Chief Justice.

[SEAL.] EDGAR W. JONES, *Clerk.*

Endorsed: In the supreme court of Oklahoma. The Guthrie National Bank *vs.* The City of Guthrie. Appeal. Filed June 12th, 1897. Edgar W. Jones, clerk supreme court.

61 And filed with the foregoing statement on appeal was an assignment of errors; which said assignment of errors is in words and figures following, to wit:

62 In the Supreme Court of the Territory of Oklahoma.

THE GUTHRIE NATIONAL BANK, Plaintiff in Error, *against* THE CITY OF GUTHRIE, Defendant in Error. } Assignment of Errors on Appeal.

Now, on this twelfth day of June, A. D. 1897, comes the plaintiff in error, by Asp, Shartel & Cottingham, its attorneys, and says that the judgment of affirmance in this cause is erroneous and against the just rights of the said plaintiff in error for the following reasons, to wit:

First. The court erred in affirming the judgment of the court below.

Second. The court erred in holding as a matter of law that the act of the territorial Legislative Assembly of the 25th day of December, A. D. 1890, being entitled "An act for the purpose of providing for the allowance and payment of the indebtedness heretofore created by the people and cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, now consolidated into the village of Guthrie," and being article one of chapter fourteen of the Revised Statutes of said Territory of the year 1891, to be unconstitutional and void.

Third. The court erred in holding that the proceedings had in the district court of the county of Logan and Territory of Oklahoma exhibited in the record in this cause, whereby certain commissioners were appointed for the purpose of auditing and allowing said indebtedness, were null and void.

Fourth. The court erred in the affirmance of the judgment of the district court of the county of Logan, in said Territory, dismissing said proceedings.

63 Fifth. The court erred in the rendition of its judgment of affirmance in said cause and of that part of said judgment taxing the costs of this proceeding in error to the said plaintiff in error.

All of which errors fully appear and are duly excepted to in the record in said cause.

ASP, SHARTEL & COTTINGHAM,
Attorneys for Plaintiff in Error.

Endorsed: In the supreme court of Oklahoma. The Guthrie National Bank *vs.* The City of Guthrie. Assignment of errors on appeal. Filed June 12th, 1897. Edgar W. Jones, clerk supreme court. Asp, Shartel & Cottingham, att'ys for plaintiff in error.

64 And thereupon, on said twelfth day of June, A. D. 1897, a certain order was entered on the journal of the said supreme court of the Territory of Oklahoma in words and figures following, to wit:

65 THE GUTHRIE NATIONAL BANK, Plaintiff in Error,
against
THE CITY OF GUTHRIE, Defendant in Error. } Journal Entry.

Now, on this twelfth day of June, A. D. 1897, comes the above-named plaintiff in error, The Guthrie National Bank, and files its petition on appeal and its assignment of errors on appeal in this cause, and, upon examination thereof, it is by the court ordered that the said appeal to the Supreme Court of the United States be, and the same is hereby, allowed.

Endorsed: The Guthrie National Bank *vs.* The City of Guthrie. Journal entry. Filed June 12th, 1897. Edgar W. Jones, clerk supreme court.

66 And afterwards and on the twelfth day of June, A. D. 1897, a certain citation was issued, served, returned, and filed; which said citation, together with all the endorsements thereon, is in words and figures following, to wit:

67 THE UNITED STATES OF AMERICA, } *ss.*:
Eighth Judicial Circuit, Territory of Oklahoma, }

To the City of Guthrie, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States of America, to be holden at the city of Washington, on the 12th day of July, A. D. 1897, next, pursuant to an appeal filed in the office of the clerk of the supreme court of the Territory of Oklahoma, wherein The Guthrie National Bank is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said plaintiff in error,

as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of June, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred twenty-second.

FRANK DALE,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest: EDGAR W. JONES,
[SEAL.] *Clerk of the Supreme Court*
of the Territory of Oklahoma.

I hereby, on this 12th day of June, A. D. 1897, accept due personal service of this citation on behalf of The City of Guthrie, the appellee above named.

BAYARD T. HAINER,
City Attorney of the City of Guthrie
and Attorney for said Appellee in said Cause.

Endorsed: In the supreme court of Oklahoma. The Guthrie National Bank *vs.* The City of Guthrie. Citation. Filed June 12, '97. Edgar W. Jones, clerk supreme court. Asp, Shartel & Cottingham, att'ys for plaintiff in error.

68 UNITED STATES OF AMERICA, } *ss:*
Territory of Oklahoma, }

I, Edgar W. Jones, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in a cause therein entitled The Guthrie National Bank, plaintiff, against The City of Guthrie, defendant, as the same appears of record and on file in my office.

In testimony whereof I have hereunto subscribed my name and caused the seal of said court to be affixed, at my office, in the city of Guthrie, on this the 25th day of June, A. D. 1897, and of the Independence of the United States of America the one hundred and twenty-second.

[Seal Supreme Court, Territory of Oklahoma.]

EDGAR W. JONES,
Clerk of the Supreme Court of the Territory of Oklahoma.

Endorsed on cover: Case No. 16,625. Oklahoma Territory supreme court. Term No., 412. The Guthrie National Bank, plaintiff in error and appellant, *vs.* The City of Guthrie. Filed July 10th, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE GUTHRIE NATIONAL BANK,
Plaintiff in Error and Appellant

AGAINST

THE CITY OF GUTHRIE,
Defendant in Error and Appellee.

No. 412

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The Congress of the United States in opening Oklahoma Territory to settlement in the year 1889 established no law for the government of the citizens settling in that country. So far as local law regulating the rights of citizens and the political organization of the communities are concerned, it was vacuity. On the 22nd day of April, 1889, from twelve to fifteen thousand people located upon and from thence inhabited the present boundaries of the

City of Guthrie, and upon the same date there were organized by the voluntary assent of the people four distinct provisional municipal corporations, denominated Guthrie, East Guthrie, Capitol Hill and West Guthrie, comprising three hundred and twenty acres each. These provisional city organizations were created by the assent of these inhabitants and continued from that time until August, 1890. They exercised all of the powers that, and even more than the law usually delegates to municipal corporations for the purpose of local self-government. They made public improvements, graded streets, erected buildings, constructed bridges, adopted laws and ordinances, and arrested, punished and imprisoned violators of such ordinances. They maintained public schools and regulated the right of possession of the various claimants to town lots within their respective boundaries and heard and determined the rights of the respective claimants to the possession of the lots and who was the first settlers and occupants of such lots and issued certificates of such fact from the local tribunal constituted by the municipal authorities to hear and determine such questions, which certificates were given the force of conclusive evidence by the Oklahoma Townsite Act of May 14, 1890, 26 Stat. at L., p. 109, sec. 2, where there is no contest, and prima facie evidence of right to the lot where the right of the claimant is disputed by some other claimant. These provisional municipal govern-

ments continued to exercise all of these functions until the month of August, 1890, when they were consolidated and organized as a village corporation under and pursuant to the laws of Nebraska as adopted and extended over said Territory by its organic act approved May 2, 1890, at which time the municipal government of the village of Guthrie succeeded to all of the improvements, property, books and documents of the several provisional governments and continued to use the streets, sidewalks and other public improvements made by such provisional governments.

During the existence of the several provisional governments they each contracted and created, in various ways pertaining to their municipal affairs, certain debts which remained unpaid at the time the said provisional governments were converted into a legally constituted municipal corporation. The village of Guthrie continued her corporate existence until after the adjournment of the first territorial legislature, when she organized as a city of the first class under the laws of the Territory of Oklahoma, and has ever since remained such, with a mayor, common council and police officers, exercising all of the functions and powers of a municipal corporation. It is composed of the same people, and embraces the same territory as the original provisional governments.

During the session of the first legislative as-

sembly of the territory, an act was passed entitled, "An act for the purpose of providing for the allowance and payment of the indebtedness heretofore created by the people of the cities of Guthrie, East Guthrie, West Guthrie and Capitol Hill, now consolidated into the village of Guthrie." (Chap. 14, Art. 1, Stat. of Okla. 1890). For copy of such act, see Appendix number one of this brief.

Pursuant to the provisions of this act, on the ninth day of March, 1891, the Judge of the District Court of Logan County, Oklahoma Territory, made and entered an order on the journal of said court appointing a commission composed of John Foster, M. D. Losey and A. J. Diehl, to perform the duties prescribed by the statute referred to, who proceeded according to the statute, heard and determined the various claims presented upon account of the four provisional municipal governments, and made their reports to the district court (see printed record, p. 2). Such report was filed about the first day of September, 1891, and found in favor of the allowance of certain claims held by the Guthrie National Bank, aggregating four thousand, three hundred fifteen and 22-100 dollars, whereupon the Guthrie National Bank, on the seventeenth day of March, 1893, filed its petition and motion to confirm the report with respect to the claims held by it (see printed record, p. 13). On the seventh day of April, 1893, the City of Guthrie filed its exceptions to the report

upon numerous grounds which remained undisposed of until the making of the order from which this appeal is taken, hereinafter referred to.

Subsequently and on the twenty-eighth day of March, 1896, the City, by its attorney, moved to dismiss the entire proceeding and each and every claim audited and allowed by the claims commission, upon the ground that the law under which said proceedings were had is null and void. To this motion is attached a schedule of the various claims affected thereby, in which the several claims of the Guthrie National Bank are included (see printed record, pp. 16-28, inclusive.)

On the second day of April, 1896, the court sustained the motion to dismiss upon the grounds of the invalidity of the law authorizing the appointment of the commission and charging the village of Guthrie with the payment of the claims audited by such commission. (See printed record, pp. 28 and 29.)

From this decision the Guthrie National Bank appealed to the Supreme Court of the Territory by petition in error. The case, on the eleventh day of June, 1897, was heard in the Supreme Court of the Territory and the judgment of dismissal entered by the court below affirmed. The case is transferred to this court by both appeal and writ of error.

THE JUDICIAL HISTORY OF THE CONTROVERSY.

In 1892 Marquis D. Losey, one of the Commissioners appointed by the Judge of the District Court of Logan County to audit the claims of the provisional municipalities, by order of the District Judge was awarded his compensation, under section five of the act authorizing their appointment, and the City refusing to pay to Losey the amount fixed as his compensation, he applied to the District Court for a writ of mandamus, which was awarded, and from this order the City appealed to the Supreme Court of the Territory, and there presented the claim that the law charging the City or Village of Guthrie with the payment of the claims in question is unconstitutional. The court, by Burford, J., rendering an elaborate opinion, held to the contrary. The tenor of this opinion is to the effect that the provisional governments could not bind themselves or others by their contracts, but that it did create a moral obligation on the part of the inhabitants, which affords a sufficient consideration to authorize the legislature to charge the taxpayers of such municipality therewith; that such act is not special legislation, within the act of July 30, 1886 (24 Stat, at L., ch. 918) nor does it violate the limitation placed by that act upon the power of municipalities to become indebted. This opinion

is found at Vol. 1 of the Oklahoma Reports, page 188.

The validity of this law next came into question in the Supreme Court of the Territory in the case of the City of Guthrie against the New Vienna Bank, 4 Okla. 196. One of the claimants, the New Vienna Bank, was a claimant before the Claims Commission, and its claim was included in the list of claims which the Commission allowed and reported to the court. Objection was made to this claim and it was placed on the trial docket of the court and a trial thereon had, the court finding in favor of the Bank and rendering judgment affirming the validity of the claim against the City and entering an order directing the City to pay the same. The validity of this law was affirmed and the grounds of the decision in the Losey case, which was rendered by the same justice, affirmed except upon one point, on which that case was overruled, and the law declared invalid, viz.: it was held that the fourth section of the act of congress of July 30, 1886 (24 Stat. at L., p. 170) prohibits cities from becoming indebted, either voluntarily or involuntarily, in excess of four per cent. of the taxable value of its property, and as there had never been an assessment and no rule in force for the measurement of its taxable property, it was incompetent for either the legislature or the city to impose or create a debt upon such municipality; and the case of Territory, ex rel. Losey against the City of Guthrie, supra, in so far as it attempts to make a distinction between

debts imposed by the legislature and debts created by the City, is overruled.

An application for a rehearing was presented and argued, which was subsequently overruled on the authority of the cases hereinafter referred to; but, in the meantime, in the cases of Hoffman vs. the Board of County Commissioners of Pawnee County, 3 Okla. 325, and Sauer vs. McMurty, 4 Okla. 447, the ruling in the New Vienna Bank case was overruled and there held that a municipality is capable, under the act of congress above referred to, of creating an indebtedness previous to the time of making any assessment.

The next case adjudged by the Supreme Court of the Territory is the case of the City of Guthrie vs. W. D. Wylie, et al., decided September 4, 1896. The opinion is not yet published, but a copy set out in Appendix number two to this brief. In that case Wylie and others obtained from the provisional city government, in December, 1889, a franchise for the construction of a street railway. One of the conditions of the ordinance granting such franchise required a deposit with the treasurer of said city of a check for the sum of one thousand dollars, which check was deposited to become forfeited to such provisional city if the grantees in the ordinance should fail to construct the railway. After the passage of the organic act of the Territory putting a code of laws in force whereby the city might become organ-

ized, the check was converted into money and deposited with the treasurer of the provisional city Subsequently the provisional government declared a forfeiture of the rights assumed to have been granted by the ordinance and the money was used for the benefit of such provisional city, which appropriated the benefit of its expenditure: Held in this opinion that the provisional city government did not become a *de facto* corporation upon the passage of the organic act which put in force the laws of the State of Nebraska in the Territory of Oklahoma, and which did not operate to breathe the breath of life into the provisional municipal government as a corporation *de facto;* and held that the liability of the provisional city was not transmitted to the *de jure* village of Guthrie nor to its successor, the city of Guthrie. This case was an independent suit brought by Wylie to charge the city of Guthrie with the liability for the money received and it does not appear that he pursued the statutory method of presenting his claim to the claims commission.

The next judicial phase arose in Martin, Mayor, et al., vs. The Territory of Oklahoma, ex rel W. H. Gray, 5 Okla. 188, which was a case in which Gray, as receiver, representing certain of the provisional city indebtedness, after trial in the district court and after an order sustaining such indebtedness and directing the issuance of the warrants in conformity to the law, and after the city authorities had

issued such warrants in conformity to the order of the court and refused to levy a tax to pay the same, procured an alternative writ of mandamus in the Supreme Court of the Territory seeking to compel the levy of such tax, and the city answered that at the date of the issuance of such warrants in conformity to such order of the court, the city, as a municipality, was already indebted in a sum greater than four per cent. of its taxable property, as shown by the last preceding assessment for the purposes of territorial and county taxation. This was adjudged to be a complete answer to the writ. The court overlooked the fact that the question had been once regularly adjudicated in the proceedings where the final judgment was rendered establishing the indebtedness of Gray as a valid claim against the city and directing the warrants to issue, and apparently overlooking the fact that the measure of the limitation should be applied at the date of the creation of the indebtedness rather than at the date of its being evidenced in a form contemplated by law.

The next case is the Guthrie National Bank vs. A. M. McElHinney, Mayor of the City of Guthrie, 5 Okla. 107, an original proceeding in mandamus to enforce the issue of warrants in conformity to the order of the court approving the findings of the Guthrie Claims Commission upon certain warrants and directing their issuance. The case was tried and a peremptory writ granted and the city appealed to the supreme court. This decision is important as ex-

pressing the last views of the supreme court of the Territory upon this question. It entirely overlooked the fact that the constitutional authority of the legislature to enact the law was merged in a judgment affirming the validity of the claim and that the mandate sought was for the purpose of enforcing a judgment of a court of record fixing and establishing a liability, and that the time to have asserted the unconstitutionality of the law was before the rendition of that judgment in the court below. Be that as it may, the opinion is significant as expressing the last views of the court upon the validity of the law. We incorporate that portion of the opinion announcing the views of the Supreme Court of the Territory herein:

"We do not think that legislative authority can under any circumstances go farther than to authorize municipal corporations to assume such liabilities, and to make such payments or claims incurred by such municipal corporations or their legal or *de facto* predecessors, if they see fit to do so; but the provisional governments were organized without authority of law and in the absence of any law authorizing the incorporation of any municipality, and the liabilities incurred were therefore personal liabilities upon those only who incurred them, and they could not in law, equity or reason, be construed into liabilities upon the municipalities which ensued and which became such under the law, when the law authorizing the creation of municipal corporations came afterward to be enacted.

"The obligations incurred were personal only and were in no sense of such a character as to be devolved upon the subsequent municipalities. Even if the liabilities were of such a character as that the

legislature might have authorized their payment, we do not think that the method adopted was such as to affix and determine such liability in the absence of a provision enabling the municipalities to have their day in court, to avail themselves of the right of jury trial, and of the right to an appeal from the awards made, nor do the provisions of the statute in question constitute that due process of law, to which the city, as other persons, is entitled. (Oklahoma City vs. Richardson, 3 Okla. page 5; State ex rel McCurdy vs. Tappan, Town Clerk, etc., 29 Wis. 664; Atkins vs. Town of Randolph, 31 Vermont, 226; County of Hampshire vs. County of Franklin, 16 Mass. 76; People, ex rel McCagg vs. Mayor, etc., 51 Ill. 17.)

"The subject was fully considered at the September term of this court, and passed upon in the case of the City of Guthrie vs. Wylie et al., and the views there expressed, are here adopted and reaffirmed."

It will be observed that the ruling in the present case is based upon the ruling in the case of Bank vs. McElHinney and in the case of Martin vs. Gray, and that no written opinion was filed in the present case. We therefore trust to be pardoned for setting out elaborately the judicial history of the controversy.

ARGUMENT.

The learned court below erred in assuming the date of the issuance of the warrants instead of the date of the law fixing the liability of the city for the payment of the debts of the provisional governments, as the time when the limit provided by the act of July 30, 1886, of four per cent. on the taxable value of the municipality should have applied nor does the act presume to create a debt upon the municipal-

ity affected by the limit imposed by the act of congress of July 30, 1886.

Keil vs. South Bend, 22 C. C. A. 618, 79 Fed. R. 921.

Commissioners vs. Goshen, 165 Ill. 17.

Commissioners vs. Reeves, (Ind.), 46 N. E. R. 995.

City of Clinton vs. Williker, (Ia.), 68 N. W. R. 431.

Thompson vs. School Dist., (Ia.), 70 N. W. R. 1093.

State vs. City of Great Falls, (Mont.), 49 Pac. R. 15.

Keeley vs. Minneapolis, (Minn.), 65 N. W. R. 115.

Kansas City vs. Ward, (Mo.), 35 S. W. R. 600.

The court erred in its conclusion that it was incompetent for the legislature to impose the liabilities created by the provisional governments upon the *de jure* municipalities succeeding to the benefits of the material and social betterments of the community created by those provisional governments. See:

Territory ex rel Losey vs. The City of

Guthrie, 1 Okla. 188, page 12, and authorities there collected and cited;

Also,

Simonton Municipal Bonds, sec. 260;

Read vs. Plattsmouth, 107 U. S. 568;

Ewell vs. Daggs, 108 U. S. 151;

Sherman Co., vs. Simons, 109 U. S. 739.

The court erred in its assumption that no right of appeal is provided from orders of allowance made by the district court. By section 8, article 24, chapter 70, paragraph 4656, of the Code of Civil Procedure of the Territory, which took effect December 25, 1890, it is provided that "appeals may be taken from the district courts to the supreme court, by either party, from all final orders and judgments." In section 9 of the organic act of the Territory it is provided: "Writs of error, bills of exception and appeals shall be allowed in all cases from final decisions of said district courts to the supreme court, under such regulations as may be prescribed by law, but in no case removed to the supreme court shall trial by jury be allowed in said court." There is nothing in the act charging *de jure* municipalities with the debts of the provisional government prohibiting appeals from orders of the district court, and the assumption that the appeal must be ex-

pressly provided for in the face of the organic law of the Territory and of the general laws of the Territory on the subject in order to entitle a party to an appeal from a final order, carries its own refutation.

The court erred in holding that the constitutional right of trial by jury is infringed. The act simply remits the proceedings to the district court for further proceedings upon the filing of the report of the referees and does not exclude the final trial of the validity of any such claim by jury, and if it were otherwise it would not affect the validity of the law.

Black's Const., L., p. 448;

Dunmore's Appeal, 52 Pa. St. 374;

Darlington vs. Mayor, 31 N. Y. 164;

McElrath vs. U. S., 102 U. S. 426.

Even were it otherwise and the City were entitled to a trial by jury the same as an individual litigant and its personal status came within the constitutional guaranty, the subject matter of the litigation is not embraced therein, because it is a statutory proceeding unknown to the common law and equitable in its character.

There may be debts claimed under the proceedings in the District Court upon which the claim of benefit conferred upon the *de jure* city or its inhabitants is too shadowy to justify the legislature in im-

posing the burden of their payment upon it. That is not the question presented here. That is for the court below to deal with in respect to the merits of each individual claim. The effect of the ruling complained of is that the legislature can impose no such claim no matter how meritorious, no matter how direct and capable of measurement those benefits may be. In this we submit the learned court below erred and that there is no constitutional objection to the passage and enforcement of the law in question.

Respectfully submitted,

HENRY E. ASP,

JOHN W. SHARTEL,

Attorneys for Plaintiff in error and Appellant

APPENDIX NO. 1.

"CHAPTER XIV.—CITY INDEBTEDNESS.

"ARTICLE I.—GUTHRIE, EAST GUTHRIE, WEST GUTHRIE AND CAPITOL HILL.

"Be it Enacted by the Legislative Assembly of the Territory of Oklahoma: (Took effect Dec. 25, 1890.)

"Section 1. That the district judge of Logan County is hereby empowered to appoint three disinterested persons to act as a commission or referees to inquire into and pass upon all claims and demands of every character heretofore issued by the city governments mentioned in the caption of this act, for all purposes.

"Sec. 2. That the owners and holders of any kind of scrip, warrants or other evidence of indebtedness heretofore issued by the city governments of Guthrie, East Guthrie, West Guthrie and Capitol Hill, shall present their claims to the commissioners or referees, to be appointed by the district judge, under oath, stating that the same is a bona fide claim, that they performed the labor or advanced the money or furnished the materials or purchased same for a valuable consideration, and that they believe the city, issuing the same did so for necessary expenses incurred in running the city government, and said

master shall hear further evidence if he deem necessary before allowing the same.

"Sec. 3. The commission or referees shall keep a record of all claims filed with them for allowance and keep their office open during the hours of nine o'clock in the morning and four o'clock p. m., and shall be allowed sixty days to hear and determine all claims, or longer if the district judge so orders. Said commission or referees shall immediately after this appointment extend ten days notice in some newspaper published in the village of Guthrie, notifying all parties holding or owning any claims mentioned in this act to present the same to them for allowance; and all persons who fail to present their claims within thirty days from date of first publication mentioned in this section shall be forever precluded from so doing hereafter.

"Sec. 4. That after the commission or referees shall have passed upon and allowed any and all claims mentioned in this act, they shall make a report to the district court of same showing the names and amounts allowed by them, and also all claims and the names of persons and amounts disallowed by them, for approval or disapproval of the district judge. And all claims allowed and approved by the district judge shall be certified to the mayor and council of the village of Guthrie, who are hereby authorized and directed to issue warrants upon the village and payable by the villages to the holders and owners,

payable in installments each of the amounts to be in one, two, three, four and five years to bear interest at the rate of six per cent. per annum from the date of the allowance by the commission or referees, and said mayor and council of the village of Guthrie shall levy a tax upon the property of the residents of said village to pay the warrants herein referred to, levying same upon each subdivision heretofore constituting Guthrie, East Guthrie, West Guthrie and Capitol Hill according to the amount of indebtedness created by the city councils, the mayors and school boards, heretofore acting for and in behalf of the people resident of said cities. Each of said cities to be liable for and taxable under this act for the amount of indebtedness created by them.

"Sec. 5. The said commission or referees shall be allowed such compensation as the district judge may allow them for the services to be performed by them under this act, and the village of Guthrie shall pay the same to the said commission or referees upon the order of the district judge.

"That this act take effect and be in force from and after its passage and approval."

APPENDIX NO. 2.

THE CITY OF GUTHRIE vs. W. D. WYLIE, ET AL.

June Term 1896.

Filed September 4, 1896.

1. PROVISIONAL CITY—NO LAWFUL AUTHORITY POSSESSED BY:—The so-called provisional city of Guthrie was not a *de jure* nor *de facto* municipal corporation, and had no power to contract or bind itself or others, and its *de facto* or *de jure* successor or successors cannot be held liable upon its contract or for its torts.

2. MUNICIPAL CORPORATIONS—LEGISLATIVE AUTHORITY FOR:—Prior to May 2, 1890, there was no law in the Territory of Oklahoma authorizing the creation or existence of municipal corporations. Where there is no law authorizing *de jure* municipal corporations a *de facto* corporation cannot exist. Municipal corporations can only exist under and by virtue of legislative enactment. 1 Okla. 293.

3. ORGANIC ACT—*DE FACTO* CORPORATIONS:—The Organic Act of May 2, 1890, made provision for the organization of Municipal corporations adopting and extending the Statutes of Nebraska over this Territory. The passage of said act did not *eo instanti* convert the provisional government of the city of Guthrie into a *de facto* municipal corporation. The provisions in said statute relating to the organization of villages requiring a majority of the taxable inhabitants of such village to present a petition to the county commissioners of the county, praying that they may be incorporated into a village, designating the name they wish to assume and the metes and bounds of the proposed village and requiring said commissioners to enter an order of incorporation upon their records designating the metes and bounds thereof and declaring the said proposed vil-

lage incorporated, and appointing trustees therefor, were conditions precedent to the vesting of any municipal authority in such village corporation. The inhabitants of the so-called provisional city of Guthrie, having failed until the first of August, 1890, to attempt to comply with these conditions, did not, before that date, become a corporation *de jure* or *de facto*. To establish a corporation *de facto*, the existence of a law authorizing its formation; proceedings taken for that purpose, professed compliance with the law, and acts of subsequent user are essential. A *de facto* corporation is one where the proceedings for its organization are irregular or defective when by regularity of proceedings to incorporate, it might be one *de jure*.

(Syllabus by the Court.)

ERROR FROM THE DISTRICT COURT OF LOGAN COUNTY, before Frank Dale, District Judge.

Bayard T. Hainer, for plaintiff in error.

Keaton & Cotteral, for defendant in error.

The facts are stated in the opinion.

TARSNEY J.: The facts presented in this record necessary to be stated are: That on the 22nd day of April, 1889, the townsite of the present city of Guthrie, in this Territory, was settled upon by townsite settlers; that by a popular vote the people living on said townsite in November, 1889, attempted and assumed to establish and organize a municipal city government. That they went through the forms of electing and qualifying a mayor, council clerk, treasurer and other officers common to a city government. That the persons assuming to be such

officers performed the duties usually incident to the authorities of a municipal corporation; assumed to pass ordinances, keep records, etc., used a corporate seal, and was known as a 'Provisional City Government.' No distinction is shown between this organization and an ordinary city government, except that it is not assumed that it was organized by any legal authority, or under any statute or legislative grant. This provisional government, during its existence, assumed to pass ordinances, resolutions, etc., and to perform the usual functions, executive, legislative and judicial of an ordinary lawful city government, until about August 1, 1890. That on or about the fourth day of December, 1889, the common council, mayor and city clerk of said provisional government, undertook, by ordinance, to grant to W. D. Wylie, F. A. Willman and A. Devereaux the privilege of constructing, maintaining and operating a street railroad or street railroads in said provisional city. One of the conditions of said ordinance requiring the deposit, with the treasurer of said city, by the grantees in said ordinance, of a certain check for the sum of One Thousand Dollars, and that said grantees deposited with said treasurer a check for said amount, drawn on the North Texas National Bank of Dallas, Texas, properly certified. Said check was to become forfeited to said provisional city, should the grantees in said ordinance fail or refuse to comply with certain conditions in said ordinance

specified. That afterwards, by agreement, T. J Oliver and Fred Cullen were associated with the said Wylie, Willman and Devereaux in interest in the rights assumed to be granted by said ordinance, and in said deposited check. That on the 11th day of June, 1890, said check was by the treasurer of said city converted into money and said money was deposited with the treasurer of said city. That on the 13th day of said June, the said common council of said provisional city, by resolution, declared a forfeiture of the rights assumed to have been granted by said ordinance, by reason of an alleged failure upon the part of the grantees therein to comply with the provisions thereof and declared the money drawn on said check to be forfeited to said provisional city. That said council converted and appropriated the said $1,000 of money to the use of the said city, using $300.00 thereof for the purpose of a fire department, and $700.00 for the purpose of a police department.

By the Organic Act of Oklahoma Territory, approved May 2, 1890, certain chapters and provisions of the Compiled Laws of the State of Nebraska, in force November 1, 1889, in so far as applicable, were adopted and extended over the Territory of Oklahoma and put in force therein. These laws of Nebraska, thus made operative in the Territory, provided for the organization of cities of the second class and villages; and under this statute, on or about the 1st of August, 1890, the village of Guthrie was organized

and continued in existence until 1891, when the present city of Guthrie, plaintiff in error, was organized according to the laws of the Territory, enacted by the legislature of said Territory.

Defendants in error commenced this suit in the district court of Logan County to recover the said $1,000 and interest thereon from the present city of Guthrie. On the trial below, the court found for the defendants in error and rendered judgment in their favor for $1,337.70, from which judgment plaintiff in error has appealed to this court. The only assignments of error necessary to be considered are the following:

First. The complaint does not state facts sufficent to constitute a cause of action .

Third. That the decision of the court is contrary to law.

It is unnecessary for us to consider the circumstances of the organization of the so-called provisional government or its action in assuming to grant to the defendants in error the privilege of constructing, maintaining and operating a street railroad, or whether there was any failure or default upon the part of the defendants in error with reference to the conditions of the pretended grant of such right as would justify and authorize the forfeiture of the deposit, made to secure compliance with said conditions; as we must conclude that all and every act of

said provisional government so-called, was without authority of law, there being at the time no lawful authority for its creation or existence. At the time this pretended government was established there was no law authorizing the creation of municipal governments in this Territory, and therefore no power to invest them with any of the functions of government. This so-called provisional government was not even a *de facto* corporation, and had no power or authority to contract or bind itself or others dealing with it. Where there is no law authorizing *de jure* corporations, a *de facto* corporation cannot exist. It is unnecessary for us to elaborate this proposition, as it has already been clearly and definitely determined by this court:

Losey vs City of Guthrie, 1 Okla. 188;

Blackburn vs. Oklahoma City, 1 Okla. 292;

Oklahoma City vs. Richardson Lumber Co., 3 Okla. 5.

A municipal corporation which by law is the successor of another, and which acquires all the property, franchises, rights and improvements, and embraces the same territory, and is composed of the same people as its predecessor, is liable for the valid contracts and legal liabilities of such predecessor.

Blackburn vs. Oklahoma City, Supra;

Broughton vs. Pensacola, 93 U. S. 265;

Mobile vs. Watson, 116 U. S. 289;

Milner's Admr. vs. City of Pensacola, 2 Woods, 632;

O'Connor vs. Memphis, 6 La. 730;

Mt. Pleasant vs. Beckwith, 100 U. S. 514.

New Orleans R. R. Co. vs. City of New Orleans, 26 La., Ann.

A municipal corporation will be held liable for the wrongful conversion of the money or property of a citizen. City of Oklahoma City vs. Richardson Lumber Co., 3 Okla. 5.

It follows from these authorities that if the government of the City of Guthrie, in existence and exercising governmental functions on the 13th day of June, 1890, was a *de jure* government, or even a *de facto* government, and it then converted to its use the one thousand dollars of the moneys belonging to the defendants in error, the liability therefor to said defendants in error was transmitted to its lawful successor, the present city of Guthrie, plaintiff herein, and that said plaintiff in error would be liable to defendants in error therefor.

This court, in the case of Blackburn vs. Oklahoma City cited supra held, that the act of congress approved May 2, 1890, made provision for the organization and existence of *de jure* municipal corporations in Oklahoma and that a provisional government, such as the so-called provisional government of Guthrie city, became and was a *de facto* corporation, from and after that date, and continued to be a *de facto* corporation until it was organized as a village corporation under and by virtue of said laws of the state of Nebraska. If this last authority embodies the correct principle of law, then it is decisive of this case and upon its authority the defendants in error would be entitled to recover. We are not now satisfied that that case correctly stated the principle involved.

The Organic Act of May 2, 1890, adopting certain chapters and provisions of the laws of Nebraska and extending the same over this Territory, made such laws operative from that date; but the record in this case does not show, nor did the record in Blackburn vs. Oklahoma City show that the provisional city government ever took any steps to invoke the powers and authority that might be conferred by those laws, or to incorporate under such laws in the manner or according to the proceedings provided therein for incorporation.

The laws of Nebraska adopted for this territory, did not contain any provision or authority for organ-

izing cities where no corporation had previously existed. Those laws only provided for changing organized villages into cities and organized cities of one class into organized cities of another class; consequently, there was no authority under those laws for organizing any municipal corporation in this Territory, except a village corporation, and the section of the statute relating to the constitution and incorporation of villages, reads as follows:

"Section 40. Any town or village containing not less than two hundred nor more than fifteen hundred inhabitants, now incorporated as a city, town, or village, under the law of this state, or that shall hereafter become organized pursuant to the provisions of this act, and any city of the second class which shall have adopted village government as provided by law, shall be a village, and shall have the right, powers, and immunities hereinafter granted and none other, and shall be governed by the provisions of this subdivision * * * That whenever a majority of the taxable inhabitants of any town or village, not heretofore incorporated, under any law of this state, shall present a petition to the county board of the county in which said petitioners reside, praying that they may be incorporated in a village, designating the name they wish to assume, and the metes and bounds of the proposed village; and if such county board or a majority of the members thereof shall be satisfied that a majority of the taxable inhabitants of the proposed village have signed such petition, and that inhabitants to the number of two hundred or more are actual residents of the territory described in the petition, the said board shall declare the said proposed village incorporated, entering the order of incorporation upon their record, and designating the metes and bounds thereof; and thereafter the said village shall be gov-

erned by the provisions of this act applicable to the government of villages. And the said county board shall, at the time of the incorporation of said village, appoint five persons having the qualifications provided in sec. 42, of this act, as trustees, who shall hold their offices and perform all the duties required of them by law, until the election and qualification of their successors at the time and in the manner provided in this act."

In our opinion, no canon of construction would warrant an interpretation of this section that would make it self-operative. The act does not purport, in any of its provisions, to create villages. It simply authorizes their creation and incorporation by means of machinery it specifies, and in the manner and upon conditions expressly stated. By its terms, the inhabitants of a village, not incorporated, were required to present a petition to the county board, praying that they might be incorporated into a village, designating the name of the village, its metes and bounds; that then and not until then might said board declare the said proposed village incorporated; that they should enter the order of incorporation upon their records; that such order, thus recorded, should designate the metes and bounds of the lands embraced in said village, and that thereafter, only, should said village be governed by the provisions of the act.

The act did not, upon its adoption for this Territory, operate *eo instanti* to breathe the breath of life into municipal corporations whose inhabitants were unenumerated and whose territorial boundaries

were undetermined. Compliance with the statute by filing a petition for incorporation, showing the required number of inhabitants, outlining the district over which the corporation was to exercise powers, praying incorporation, the action of the county board, its declarations of incorporation and its record, were all acts, the performance of which were conditions precedent to the vesting of any municipal authority in the corporation.

Abbott vs. Omaha Smelting Co., 4 Neb. 416;

Childs vs. Hurd, 32 W. Va. 66;

Spencer vs. Cook, 16 La. 163;

Bigelow vs. Gregory, 73 Ill. 197.

If then there was no attempt to incorporate by complying with the requirements of the statute, how could such organization be deemed to be a *de facto* corporation? What is a *de facto* corporation? It must appear to be acting under color of law. The existence of a law authorizing incorporation and mere user will not constitute a corporation *de facto* Thompson on Corporations, sec. 503.

To establish a corporation *de facto*, the existence of a law authorizing its formation, proceedings taken for that purpose in professed compliance with the law, and acts of subsequent user are essential to be shown.

Methodist Episcopal Union Church vs. Picket, 98 N. Y. 482;

Heaston vs. Cin. Ft. Wayne R. R. Co., 16 Ind. 275.

A *de facto* corporation is one where the proceedings for its organization are irregular or defective, when by regularity of proceedings to incorporate, it might be one *de jure*.

It has been held in the state of Nebraska that the filing of articles of incorporation with the county clerk, is a condition precedent to the existence of any corporate franchise; that the law authorizing the incorporation and the articles so filed taken together, are considered in the nature of a grant from the state, and constitute the charter of the company. Abbott vs. Omaha Smelting Co., 4 Neb., 416.

In that case the court held that the effect of a failure to comply with such condition precedent, was that the parties acting in the matter did not bring themselves within the purview of the statute, and that no corporate franchise or corporate powers in any respect existed as to them; that they were not a *de facto* corporation.

In Buffalo R. R. Co. vs. Carey, 26 N. Y. 77, the court says that:

"If the papers filed by which the corporation is sought to be created are colorable, but so defective that in a proceeding on the part of the state against

it, it would for that reason be dissovled, yet by acts of user under such organization, it becomes a corporation *de facto*."

In that case the company had its "papers filed" and therefore acted under a color of franchise.

If the mere continuance of acts begun in usurpation was to confer corporate franchises, why should the statute require a petition from the inhabitants to the county board praying incorporation, which should show the number of inhabitants, the extent and boundaries of the district and require the county board to judicially consider the petition, and declare the incorporation and make a record of their actions, and why should it require all this but as a prerequisite existence?

The general rule is that the existence of a corporation may be proved by producing its charter and showing acts of user under it; but this rule has no application to a corporation founded under the provisions of a general statute, requiring certain acts to be performed before the corporation can be considered in *esse*, or its transactions possess any validity. The existence of a corporation thus formed must be proved by showing a substantial compliance with the requirements of the statutes.

Abbott vs. Omaha Smelting Co. supra.

The right to be considered a corporation and to exercise corporate powers, depends upon the fact

of the performance of the particular acts named in the statute, essential to its corporate existence.

Field vs. Cook, 16 La. 153.

It is said that persons who have contracted in writing with such an association without any color of franchise, are not estopped from denying its corporate capacity.

Welland Canal Co. vs. Hathaway, 8 Wend, 480;

Williams vs. Bank of Michigan, 7 Wend. 539.

The authorities are too numerous to require citation that the doctrine is now settled, that where individuals have associated themselves together under corporate name and assumed to exercise corporate powers, without having complied with the essential requirements made conditions precedent in the statute of incorporation, they are not a corporation *de facto*, but are co-partners.

Applying these rules and the doctrine of the authorities here cited, and while the record in this cause shows that the so-called provisional government of the city of Guthrie, assuming to exercise corporate functions, prior to May 2, 1890, continued the assumption and exercise of such powers until the first day of August, 1890, when they were succeeded by a *de jure* village corporation; that during that time they filed no petition, nor did the inhabitants represented by them, file any petition invoking life

and power from the statute, never made known to the board of county commissioners in any manner the number of inhabitants or the territorial boundaries of the district, never were declared by said county board to be an incorporation, and never claimed or pretended to be acting under authority of the law, or under color of the law, we cannot find that there was any of the elements of a *de facto* corporation; but that the nature and character of the organization remained unchanged, and was the same from a period long prior to said 2nd day of May, 1890, to the first day of August of that year.

We must therefore conclude that on the 13th day of June, 1890, there was no *de jure* or *de facto* municipal corporation existing at Guthrie; that the government or pretended government that received the check and money of the defendants in error and converted said money, was not a *de jure* or *de facto* corporation; that such moneys were converted to the uses and purposes of a police department and fire department for the employment of which there was no authority of law; and that such conversion of the money of defendants in error, did not create a legal liability to them that could be transmitted to any lawful municipal corporation thereafter organized under the law.

It follows that the rule of law upon this proposition was not correctly stated in Blackburn vs. Oklahoma City, 1 Okla. 292, and that the present city of Guthrie is not liable to defendants in error for the

moneys sued for; that the court below erred in rendering judgment in favor of the defendants in error and against the plaintiff in error.

The judgment of the court below is therefore reversed, and this cause dismissed.

All the justices concur, except Dale, C. J., who tried the case below, and Bierer, J., who was of counsel in the cause, not sitting.

THE SUTHERLIN NATIONAL BANK, PLAINTIFF IN ERROR AND APPELLANT,

vs.

THE CITY OF SUTHERLIN.

REPLY BRIEF OF PLAINTIFF IN ERROR.

JOHN W. SHAKTER,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-18-20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

No. 133.

THE GUTHRIE NATIONAL BANK, PLAINTIFF IN ERROR AND APPELLANT,

vs.

THE CITY OF GUTHRIE.

REPLY BRIEF OF PLAINTIFF IN ERROR.

First. There is no merit in the claim that the amount in controversy is not sufficient to give this court jurisdiction. Under the terms of the organic act of the Territory, 26 Stats., 81, the amount necessary to give this court jurisdiction on appeal or error is fixed at five thousand dollars, and interest is not excluded (*U. S. vs. Daniel*, 12 Peters, 32; *Woodward vs. Jewell*, 140 U. S., 247).

The interest on the amount in controversy is computed under the statute, Appendix No. 1, Plaintiff's Brief, "at the rate of 6 per cent. per annum from the date of the allowance by the commission or referees."

The Record, page 4, shows that the report of the commission was filed in the district court on the 1st day of Septem-

ber, 1891, and the judgment of the district court was entered on the 2d day of April, 1896, four and one-half years afterwards. (See Record, page 28.)

The decision of the supreme court of the Territory (Record, page 33) was entered on the 11th day of June, 1897, more than five and one-half years after the commission allowed the claims owned by the plaintiff in error. The writ of error and appeal were sued out and taken on the same day, and under the authorities last cited the interest computes to this time, or five and one-half years.

Second. There is no merit in the contention that the necessary parties are not before the court to enable it to review the case. The proceeding in the court below presented a several action by the holder of each individual claim, and they had nothing in common except a common forum for the enforcement and determination of their rights. The other claimants are all wholly unaffected by any steps that can be taken in this case. There was no necessity for their severance cases; they were severed already, in fact (Milner *vs.* Meek, 95 U. S., 252; Gilfillan *vs.* McKee, 159 U. S., 333; Polk *vs.* Corell, 130 Neb., 884; Appeal of Adamson, 110 Pennsylvania Stat., 459).

The claim that the Guthrie national bank nowhere appeared as plaintiff in the court below is not in accordance with the facts disclosed by the record (see bottom of page 4 of Record, top of page 7, top of page 13, bottom of page 28), from which it is clear that the Guthrie national bank had sufficient status as a party claiming in the court below to protect its interests and obtain a hearing upon the merits.

Third. The claim that the act of the legislature is special legislation is untenable (City of Guthrie *vs.* Losey, 1st Oklahoma Ter., 188). The conditions existing in the city of Guthrie were anomalous and obtained in no other locality in the Territory. It is true that similar provisional governments existed within the present territory of Oklahoma City,

which bequeathed no debts to successors; also in the city of Lisbon, or Kingfisher, which left certain debts behind, but which its successor, the village of Kingfisher, voluntarily liquidated and assumed, and which assumption was legalized and ratified by chapter 15 of the Statutes of Oklahoma of 1890. The various subdivisions of the city of Guthrie were more elaborate in their operations than the other municipalities; they secured water works, improved the streets, maintained public schools, and were, possibly, more prodigal in their expenditures; and the legislature, in view of the unwillingness of the municipality to assume the indebtedness contracted by the provisional governments, manifestly hesitated in imposing such debts absolutely as liabilities on the city without the judicial determination as to their character, and the result of the investigation of the commission certainly justified the legislature in its course, as it is shown by the Record, page 7, that the disallowance of claims made by the referees far exceeded the amount of the claims actually allowed. The conditions existing at Guthrie being therefore such as to make them a separate class, and in a different situation from that of any other municipality in the Territory, it was competent for the legislature to declare the taxpayers of each subdivision of such city liable for the payment of *bona fide* debts contracted for their benefit and with their consent by the provisional government of their own creation. The case in many of its features would seem to be on a parallel with the facts in Stark *vs.* Starr, 94 U. S., 477, and Stark *vs.* Starr, 6 Wallace, 402.

Fourth. The basis of the claim of the defendant in error that the act of the legislature in question does not constitute due process of law is the assertion of a very narrow and irrational construction of that act. The idea of the legislature in the passage of this act seems to be manifestly to assimilate the case to any other proceeding of a court of chancery where a voluminous matter of accounting is involved,

and that they invoked a well-known and established power of the court to call to its aid the assistance of masters or referees for the purpose of aiding it and facilitating in the work of the judicial determination as to what claims against the provisional cities ought in equity and good morals to be charged against the tax-payers.

And in this connection permit us to correct both the counsel of the defendant in error in their briefs and the court below in its view that the *de jure* municipality of the city was sought by this act to be charged with this liability. The only personal liability imposed upon the city of Guthrie by this act is the payment of the expenses of the reference to the commissions and the master, and the rest of their duties in the premises are merely ministerial, namely, the issuing of certificates and warrants of indebtedness to the holders of the claims finally ascertained by the district court to be properly payable, and the levying of an annual tax in the proper subdivisions of the city to pay its proportion of the debts so charged against it.

It was also manifestly the intention of the legislature under the act to give the court, upon the incoming of the report of the master, all of the powers that the court of chancery possesses, and from the language of the act it is also quite evident that the terms "district judge" and "district court" are used interchangeably.

In this view of the law, even if the authorities cited by the counsel upon the question of due process of law were otherwise applicable, they would be entirely beside the case, for here is evident every element of due course of procedure which is known to the law, which hears before it condemns.

Respectfully submitted.

JOHN W. SHARTEL,
Attorney for Plaintiff in Error.

P/33
Brief for Plaintiff in Error
Filed Jan 10, 1899

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 152.

THE GUTHRIE NATIONAL BANK, PLAINTIFF IN ERROR AND APPELLANT,

vs.

THE CITY OF GUTHRIE.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR AND APPELLEE.

W. J. HUGHES,
JOHN L. LOVE,
JOHN E. RICHARDS,
D. R. WILMER,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-10-99

IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

No. 133.

THE GUTHRIE NATIONAL BANK, PLAINTIFF IN ERROR AND APPELLANT,

vs.

THE CITY OF GUTHRIE.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR AND APPELLEE.

Statement of the Case.

By a proclamation of the President, issued under date of March 3, 1889, in pursuance of the act of March 1, 1889 (25 Stat., 757), ratifying a treaty made between the United States and the Creek Indians, what is now known as the Territory of Oklahoma was thrown open to settlement, subject to the conditions and restrictions imposed by the act of March 2, 1889 (25 Stat., 1004).

By the act of May 2, 1890 (26 Stat., 81), Congress provided a temporary form of government for the Territory, which became and is the organic law of the Territory.

On May 14, 1890 (26 Stat., 109), Congress enacted a law regulating town-site entries of lands in the Territory, under which certain trustees were to be appointed by the Secretary of the Interior to determine the location of town sites, supervise the necessary surveys, and approve the surveys already made by the inhabitants of the Territory.

After the Territory was opened for settlement, and before the passage of the organic act of May 2, 1890, and the act of May 14, 1890, a number of town sites were located and settled upon by the inhabitants of the Territory, the lands being surveyed into streets, alleys, squares, blocks, and lots, and what were known as provisional municipal governments were formed. Officers thereof were selected by the people of the respective towns and a form of government was attempted to be carried on. The persons so chosen as officers incurred indebtedness in carrying on the so-called governments without any authority or power to raise the necessary revenues, by taxation or otherwise, to pay the same.

Upon the assembling of the first territorial legislature, in December, 1890, a code of laws for the permanent government of the Territory was enacted, and thereupon these provisional city governments, acting under authority of said laws, were incorporated and became legal municipal governments. In this manner the provisional governments of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, lying adjacent to one another, were consolidated into the regularly organized village of Guthrie.

Thereafter, in order to provide a method by which to raise funds to pay off the indebtedness incurred by the so-called provisional governments of the four villages named, the legislature passed the act of December 25, 1890, being chapter 14, article 1, of the Statutes of Oklahoma (edition of 1890), which is printed in the appendix hereto.

Acting under the pretended authority of the last-mentioned act, the district judge of Logan county appointed a commission, consisting of three persons, to audit and adjust

certain claims then existing and incurred by the persons assuming to act as officers of these so-called provisional governments (Rec., p. 3).

The commission so appointed proceeded to act under authority of the act mentioned (Rec., p. 3), and on September 1, 1891, filed in the district court of Logan county what is known as its final report (Rec., pp. 4–7). Upon the filing of this report the matter was docketed as an action pending in that court (Rec., p. 7), and on April 7, 1893, the City of Guthrie, the successor of the village of Guthrie (Rec., p. 7), filed its exceptions to the report (Rec., pp. 8 to 12).

On March 17, 1893, the Guthrie National Bank, appearing in court for the first time in the matter and alleging ownership of a number of the claims involved, filed a motion asking the court to approve the finding of the commission as regards the claims held by it (Rec., p. 13), which amounted to $4,315.22 (Rec., p. 16). The matter was allowed to remain undisposed of until March 28, 1896, when the City of Guthrie filed a motion in the district court to dismiss the proceeding by the bank, and to dismiss all proceedings based upon the act mentioned for the reason that the act and all proceedings under it were void (Rec., pp. 16 to 28).

On April 2, 1896, the matter came on for hearing upon the motion of the bank to confirm the report of the commission, the exceptions of the city to the report, and the motion to dismiss filed by the city. The court on the last-named date sustained the motion of the city and dismissed the proceeding for the reason that the act under which the commission was appointed was unconstitutional and void; to which order of the court the bank took its exceptions (Rec., p. 29).

The bank thereupon prosecuted error to the supreme court of the Territory to reverse the order of the district court. On June 11, 1897, the supreme court affirmed the order of the district court dismissing the proceeding (Rec., p. 33), and rendered judgment against the bank for costs.

To reverse the judgment of the supreme court of the Ter-

ritory, an appeal was taken to and a writ of error sued out from this court.

Synopsis of Argument.

It is contended on behalf of the City of Guthrie that, there being involved in this proceeding not more than the sum of $4,315.22, this court has no jurisdiction, the jurisdictional amount being $5,000.

2. That even if there were a sufficient amount involved, yet, as the plaintiff in error and appellee was not a party before the district court, it was not a party before the supreme court of Oklahoma, and therefore cannot be heard here.

3. That, even if it was a party before the district court, as it alone of all the parties appealed to the supreme court of Oklahoma, and as there was no summons and severance, the latter court had no jurisdiction, and therefore this court cannot review its decision.

4. Admitting, however, that this court has jurisdiction, it is further contended that the act which gave birth to this proceeding is invalid because it does not afford due process of law for the determination of the claims against the city, as the commission appointed thereunder for that purpose was not a judicial body, and no judicial review was provided for.

5. That, admitting the validity of the law in the above respect, it provides a method of determining questions of fact by a means other than trial by jury.

6. That the act is special legislation and forbidden by the act of July 30, 1886 (24 Stats., 170).

7. That it creates a new forum for the determination of questions properly cognizable by a court, and that no judicial hearing of such questions is provided for.

8. That, admitting the jurisdiction of this court and the validity of the legislation, it is contended that the claims herein are not valid against the city because they arise out of debts contracted by persons who were not even *de facto* officers.

ARGUMENT.

I.

Jurisdiction.

(a.) *Certificate of Counsel.*—At the threshold of the case we are confronted with the question of the jurisdiction of this court to consider it.

By the act of March 3, 1885 (chap. 355, 23 Stats., 443), it was provided that in cases arising in the Territories, which involved $5,000 or over, there should be a right to a review by this court on appeal or writ of error of the judgments and decrees of the supreme courts of the Territories, and by the act of May 2, 1890 (chap. 182, 26 Stats., 81), organizing the Territory of Oklahoma, it was provided in section 9 that—

> "Writs of error and appeals from the final decisions of said supreme court [of the Territory] shall be allowed and may be taken to the Supreme Court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property or the amount in controversy, to be ascertained by oath or affirmation of either party or other competent witness, shall exceed five thousand dollars."

Opposing counsel certifies (Rec., pp. 34 and 39)—

> "That he is one of the attorneys for the plaintiff in error; that he is familiar with the controversy involved in this case, and knows the amount at issue therein and

involved therein and of controversy therein, and knows the amount in controversy in said cause, exclusive of costs, to exceed the sum of $5,000."

The amount of the claims presented to and considered by the commission is shown by the record to have been in excess of $5,000 (Rec., p. 7). The amount claimed to be owned by the Guthrie National Bank, however, is stated by the petition in error to the supreme court of the Territory of Oklahoma to be $4,315.22 (Rec, p. 16). The amount in controversy being thus specifically shown by a pleading in the case, can this court be given jurisdiction by the certificate above quoted which contradicts such showing? (Richmond *vs.* Milwaukee, 21 How., 391; Red River Cattle Co. *vs.* Needham, 137 U. S., 632, 634.) There is nothing in the record to indicate that the case involves, so far as the appellant and plaintiff in error here is concerned, any larger amount than $4,315.22. It may be true that the disposition of this case will determine other similar controversies, and dispose of the remaining claims which were reported upon by the commission to the district court; but such claims of other parties are not before this court. The bank alone appealed to the supreme court of the Territory, and nothing more than was before that court is presented here.

It is contended on behalf of the city that the provision of the organic act of the Territory in relation to a certificate of counsel as to the amount in controversy in any suit, for the purpose of determining the right to a review of a judgment therein by this court, was intended by Congress to apply to cases in which the amount actually involved was not shown in the pleadings in the case, and was never intended to cover cases where the record disclosed the amount involved. Certainly Congress never intended that counsel could by a certificate impeach the accuracy of the record in the case, and that such certificate, notwithstanding the averments of the pleadings, should give jurisdiction to this court. Congress

doubtless intended merely to provide that where the amount was not specifically shown in the record, but was actually involved in the case, it might be ascertained by the certificate of counsel (U. S. *vs.* Trans-Missouri Freight Association, 166 U. S., 290, 310).

If it shall be urged that to the amount claimed in the petition in error, viz., $4,315.22, there should be added interest, in accordance with the provisions of the act of the territorial legislature, which if computed to the present time would make up the jurisdictional amount of $5,000, the answer is that if interest is to be taken into consideration at all, it began to run, under the terms of the act, when the commission allowed the claims owned by the bank; that that finding was in 1892 (Rec., p. 13); that if there was any distinct point of time when the proceeding of the bank against the city commenced, it was when the bank submitted its motion and petition to the district court to approve the claims owned by it which had been allowed by the commission, which was on March 17, 1893 (Rec., p. 13), and that interest at 6 per cent. on the amount of the claims from an unknown month and day in 1892 to March 17, 1893, say fifteen months, would still leave the amount involved less than $4,700. Certainly the interest which has accumulated since the time of bringing suit cannot be held to have been sued for when the action was brought.

(*b.*) *The Bank Not a Party.*—When the case was pending in the district court of Logan county it was entitled "J. W. McNeal *et al.*, including all claims, *vs.* The City of Guthrie" (Rec., p. 8). It nowhere appears that the Guthrie National Bank was a party to the proceeding, unless it was covered by the blanket "*et al.*" Section 3995, Statutes of Oklahoma, provides that "the title of a cause shall not be changed in any of its stages." Indeed, it may be inferred from the language of the petition in error (Rec., p. 20), "and thus acquired and became the owner of divers and sundry of

such claims so audited and allowed by said board," that at the time of the report of the commission to the court the bank was not the owner of the claims asserted by it. Furthermore, the name of the bank does not appear as the owner of any of the claims passed upon and allowed by the commission (Rec., p. 5 *et seq.*). It is not shown in the record that after the bank acquired ownership of the claims it was made a party to the proceedings in the district court, even if it could be made a party, which we deny. No assignment or other proof of ownership appears; nothing but an allegation of ownership (Rec., pp. 4, 5, 13). If the bank was not a party to the proceedings in the district court, but afterwards by proper assignment became the owner of the claims asserted here, in the absence of proof of ownership and application to the district court to be made a party to the case, it was not a party in the court below, and cannot therefore be heard here.

It is to be noted also that the petition of the bank above referred to was not verified, as required by section 3986, Statutes of Oklahoma, and that no proof was offered to show ownership by the bank.

(c.) *No Severance.*—Supposing, however, that the bank was, and was properly, a party before the district court, it is apparent from the petition in error (Rec., p. 2), and from its exception to the ruling of the court (Rec., p. 29), that it was not the only party plaintiff. The petition for a writ of error to the supreme court of Oklahoma was by the Guthrie National Bank alone (Rec., p. 1). There does not appear to have been any summons and severance of the parties. Without such action the court below had no jurisdiction, and therefore this court has no jurisdiction to review its decision (Estis *vs.* Trabue, 128 U. S., 225, 230).

II.

Article 1, chapter 14, Statutes of Oklahoma, violates section 1 of the fourteenth amendment to the Constitution of the United States, in that it attempts to take property without due process of law.

(*a.*) *The Statute.*—Chapter 14, article 1, Statutes of Oklahoma, provides for the appointment by the district judge of Logan county of a commission of three persons, whose duty it shall be to "inquire into and pass upon all claims and demands of every character heretofore issued by the city governments mentioned in the caption" of the act. The owners of these claims and demands are required (section 3) to present them to the commission for examination and approval or disapproval. The commission is required to keep a record of all claims filed with them for allowance, and the claims are to be presented within the time fixed by the act.

Section 4 provides that "after the commission or referees shall have passed upon and allowed any and all claims mentioned in this act, they shall make a report to the district court of the same, showing the names and amounts allowed by them, and also all claims and the names of the persons and amounts disallowed by them for approval or disapproval of the district judge; and all claims allowed and approved by the district judge shall be certified to the mayor and council of the village of Guthrie, who are authorized and directed to issue warrants" upon the village for their payment at the times and in the manner stated in the act.

It is to be observed that the act of the district judge either approving or disapproving the findings of the commission is final. No provision is found in the act for a review of his decision by any higher court of the Territory,

and no reference is therein made to any other act or statute. The act was designed to be a special method, summary in character, for determining the merits of claims and demands asserted against the City of Guthrie. It is not ambiguous and must be construed to mean just what its language imports.

The act forms no part of the general code of civil procedure, nor does it bear any relation thereto, nor is there any reference in the act to the code or to any other provision of the statutes. The act must fail unless it is sufficient in itself, for it does not form any part of the existing system of procedure and has nothing else in the statutes to supply its deficiencies.

Risser *vs.* Hoyt, 53 Mich., 185, 209.

It is therefore insisted that the act in question attempts to take property without due process of law, in that it does not provide adequate judicial machinery for determining the claims made against the city.

(*b.*) *The rule in construing statutes.*

It is a cardinal rule in the interpretation of statutes that when there is no ambiguity in the language used the court will give to the words of the statute their ordinary grammatical construction.

In the recent case of U. S. *vs.* Goldenberg, 168 U. S., 95, Mr. Justice BREWER, speaking for the court, states the rule thus (page 102):

> "The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for

believing that the letter does not fully and accurately disclose the intent. No mere omissions, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

Gibbons *vs.* Ogden, 9 Wheat., 188.
Smith on Stat. & Cons. Constr., sec. 481.
Sedgwick on Stat. and Cons. Law (2d ed.), p. 195.
Story on Const., sec. 451.

This rule is clearly applicable to the statute under discussion. There is no ambiguity in the language used. Its provisions are clearly stated, and the court in construing it will give the words their ordinary meaning; and, though the act be incomplete and fail to provide due process of law, yet, under the rule above quoted, this court will not read into the act by judicial construction those provisions, necessary to make it valid, which have clearly been omitted by the legislature.

It is true that the supreme court of Oklahoma had considerable difficulty in solving this question, and that in the cases of Territory *ex rel. vs.* City of Guthrie, 1 Okla., 404; Guthrie *vs.* Bank of New Vienna, 4 Okla., 194, it held that a party asserting a claim, or the city, had the right to have any claim docketed and tried in the district court to the court or a jury; but in order to reach that conclusion that court had to surmount the objections that the act was special and denied the city a proper hearing, by engrafting upon it the provisions of law regulating procedure in the courts of the Territory, contained in section 9 of the organic act. It was compelled, in order to make the act valid, to read into it a provision omitted by the legislature; but that act contains no language from which, even by a strained construction, it could be concluded that, after the court had approved or disapproved the claim, a trial could be had as in other cases. The legislature intended to and did provide a special

method of procedure, a finding by a commission or referees and an approval by the district court. Nothing was provided to the effect that upon the approval or disapproval the matter should be docketed and a trial had as in other cases under the general code of procedure.

If the legislature intended to provide a trial, as in other cases, after approval or disapproval of the report of the commission, what necessity was there for the appointment of referees to determine the validity of the claims and demands? If the matters were to be tried anew upon the application of the claimant or the city, what object was there in providing for the hearing before the referees? The legislature did not intend that the claims should be prosecuted under the general law, because it provided for a reference to a commission. The act provides a special method of procedure, irrespective and independent of the provisions of the general code. In the cases of Guthrie *vs.* Wylie *et al.*, 55 Pac. Rep., 103, and Bank of Guthrie *vs.* McElhinney, 5 Okla., 107, the supreme court of the Territory seems to have grasped the idea of the legislature in passing the act, for in the latter cases it reversed its former rulings and held that the act was void, for the reason that it did not provide that the city should have a proper hearing, with a right of appeal, as in similar cases, and that it attempted to affix a liability upon the city without due process of law.

Again, the act having no relation or connection with the general code of civil procedure, must be deemed to be a special remedy enacted for the particular purpose stated in its title. That being so, the rule of statutory construction that when there is special legislation on a particular subject, the general legislation must be deemed to have been superseded by the special, applies. As said in Magone *vs.* King, 1 U. S. App., 267:

> "It is a settled rule of statutory construction that general legislation must give way to special legislation on the same subject, whether the provisions are found

in the same statute or in different statutes; and general provisions must be interpreted so as to embrace only cases to which the special provisions are not applicable."

Citing—

Churchill *vs.* Crease, 5 Bing., 189.
State *vs.* Clarke, 25 N. J. Law, 54.
Long *vs.* Culp, 14 Kan., 412.
Felt *vs.* Felt, 19 Wis., 193.
State *vs.* Inhabitants of Trenton, 38 N. J. Law, 64.
Townsend *vs.* Little, 109 U. S., 504.

(c.) *What constitutes due process of law.*

In attempting to discuss the meaning of the term "due process of law," we are confronted at the outset with the difficulty of framing a definition which will correctly express the term when applied to all cases. Perhaps the first general definition of the term is that found in the case of Pennoyer *vs.* Neff, 95 U. S., 714, wherein this court, speaking through Mr. Justice FIELD, said, page 733:

> "Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit."

Respecting the meaning of the term Mr. Justice MILLER, in Davidson *vs.* New Orleans, 96 U. S., 97, says, middle page 105:

> "But, however this may be, * * * it is not possible for us to hold that a party has, without due process of law, been deprived of his property, when, as regards

> the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

In Hurtado *vs.* California, 110 U. S., 516, the meaning of the term is exhaustively discussed by Mr. Justice MATTHEWS. He says (bottom page 535):

> "Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.'"

Middle page 536 he quotes with approval the language of the court in Brown *vs.* Commissioners, 50 Miss , 468, saying:

> "The principle does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue. It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by 'due process of law.'"

To the same effect are the decisions in Hagar *vs.* Reclamation District, 111 U. S., 701, 707; Westervelt *vs.* Gregg, 12 N. Y., 202, 209; Turnpike Co. *vs.* Parks, 50 O. S., 568, 579; Burton *vs.* Platter, 10 U. S. Appeals, 657; Central Land Co. *vs.* Laidley, 159 U. S., 103, 112; People *ex rel. vs.* Supervisors, 74 N. Y., 234; Leeper *vs.* Texas, 139 U. S., 462; Marchant *vs.* Penna. R. R., 153 U. S., 380.

In Weimer *vs.* Bunbury, 30 Mich., 214, respecting the meaning of due process, the court, speaking by COOLEY, J., says, page 214:

> "The bills of rights in the American constitutions have not been drafted for the introduction of new law,

but to secure the old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation."

Page 213:

"The Constitution makes no attempt to define such [due] process, but assumes that custom and law have already settled what it is. Even in judicial proceedings we do not ascertain from the Constitution what is lawful process, but test their action by principles which were before the constitution," etc.

In the light of the foregoing decisions, it is submitted that the act does not afford the city a fair and impartial trial by a judicial tribunal to determine the validity of the claims asserted against it.

III.

The act also violates article 7 of the amendments to the Constitution in that it denies the parties the right of trial by jury.

Article 7 of the amendments to the Constitution provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

By section 6 of the organic act of the Territory of Oklahoma it is provided that—

"The legislative power of the Territory shall extend to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States."

The same general limitation is contained in section 1851, Revised Statutes.

The act of April 7, 1874 (18 Stat., 27), being an act regulating the practice in territorial courts and appeals therefrom, was passed for the purpose of reviving and confirming judgments because of the doubt existing as to whether the common-law and chancery jurisdiction of the courts of the Territory should be kept separate. By that act all proceedings theretofore taken in the courts of the Territories in conformity with their respective codes and rules of practice so far as relate to the form and mode of proceeding were ratified and confirmed subject to the proviso:

> "That no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law."

On behalf of the city it is contended that because of these constitutional and statutory restrictions the legislature of Oklahoma was without power to pass the act under discussion, which deprives the city of the right to have the validity of the claims determined by a jury.

(*a.*) *The constitutional and statutory provisions above cited apply to and are a limitation upon the power of the Territories to in any manner abridge the right of trial by jury.*

That article 7 of the amendments to the Constitution, and the act of April 7, 1874 (18 Stat., 27), are a limitation upon the power of the legislatures of the several Territories to abridge the right therein guaranteed has been settled by numerous decisions of this court

In Idaho Land Co. *vs.* Bradbury, 132 U. S., 509, 513, the question arose as to the method of procedure to be followed in the courts of that Territory. This court held (page 513) that in Idaho, as in the other Territories, there was but one form of civil action for which either a legal or an equitable

remedy might be applied, either through the intervention of a jury or by the court; provided, however, that no party should be "deprived of the right of trial by jury in cases cognizable at common law." Citing act of April 7, 1874 (18 Stat., 27).

In American Publishing Co. *vs.* Fisher, 166 U. S., 464, this court held section 3371 of the Statutes of Utah void on the ground that in civil cases it provided that a verdict might be rendered upon the concurrence of nine members of a jury, which it declared to be a violation of the act of April 7, 1874, c. 80 (18 Stat., 27), preserving to the people of the Territories the right of trial by jury in civil cases when more than $20 was involved, in cases cognizable at common law.

To the same effect is Salt Lake City *vs.* Tucker, 166 U. S., 707, and Webster *vs.* Reid, 11 How., 437.

In Thompson *vs.* Utah, 170 U. S., 343, this court, speaking by Mr. Justice Harlan, again announced the doctrine (bottom p. 346) "that the provisions of the Constitution of the United States relating to the right of trial by jury in suits at common law apply to the Territories of the United States."

It is submitted that these cases abundantly sustain the proposition that the provisions of the Constitution and the statute referred to are a limitation upon the power of the legislature of Oklahoma.

(*b.*) *The claims asserted against the city are claims cognizable at common law. In determining their validity the city is entitled to a trial by jury.*

The city insists, as it insisted and demanded (Rec., p. 12) in the courts below, that in determining the fact whether the claims, the payment of which it is sought to impose upon it, have any validity or merit, it has the right to have that question determined by a jury. On the other hand, the right to impose this burden upon the city, if it can be

called a right, exists solely by virtue of the provisions of the act in controversy. The right, then, if anything, is legal in character.

Walker, in his work on American Law, in speaking of this right, says (page 624):

> "The right, then, to a trial by jury, is confined to proceedings in courts of law, where legal rights, as distinguished from equitable, are decided upon."

In the case of Webster *vs.* Reid (11 How., 437), as in the present case, an attempt was made to provide a special and extraordinary remedy to enforce an alleged right. The two acts in many respects are similar, both being deficient in the essential provisions required by the common law.

In 1838 the Territory of Wisconsin passed an act creating a commission of three persons, whose duty it should be to settle the claims made by persons to the half-breed lands in Lee county and make partition thereof. In 1839, the Territory of Iowa having been created (Lee county then being in Iowa), the legislature of that Territory passed an act authorizing the three commissioners, who had acted under the Wisconsin act, to bring suit against "the owners of the half-breed lands" to recover for the value of the services rendered. The suits were not to be brought against any specific persons, but against the "owners of the half-breed lands;" notice was to be given by publication in a certain newspaper, and the cases were to be tried to the court and not to a jury. The commissioners brought suit, as provided in the act, and recovered judgments against the "half-breed lands," etc. Appeal was taken and the act came before this court for consideration. Several questions were raised on the argument. Among other things, it was urged against the act that it was not brought against any specific persons; no service had been obtained upon any persons, and it denied the right of a trial by jury. The court sustained all these

contentions, saying, Mr. Justice McLEAN delivering the opinion (page 459):

> "This was an extraordinary procedure from its commencement. * * * By the act under which the suits were instituted, no other designation of the defendants was required than 'owners of the half-breed lands lying in Lee county.' * * * No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. * * * In this case there was no personal notice, nor an attachment or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities.
>
> "By the seventh article of the amendments of the Constitution it is declared, 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.'
>
> "The act under which the above proceeding was had prohibited the trial by jury in matters of fact on which the suits were founded. In this respect the act was void."

In the case of Bank of Hamilton *vs.* Dudley's Lessee, 2 Peters, 492, this court held that the provision of the occupant claimant law of Ohio, which declared that an occupying claimant should not be turned out of possession until he should be paid for lasting and valuable improvements made by him, and directed the court in a suit at law to appoint commissioners to value the same (without the aid of a jury), was repugnant to the seventh amendment.

Mr. Chief Justice MARSHALL, delivering the opinion, said (page 525):

> "The seventh amendment to the Constitution of the United States declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This is a suit at common law, and the value in controversy exceeds twenty dollars. The controversy is not confined to the question of title. The compensation for improvements is an important part of it, and if that is to be determined at common law, it must be submitted to a jury."

In Coal Co. *vs.* Snowdon, 42 Pa. St., 488, the court, in discussing this right under the constitution of that State, says (page 492):

> "'Trial by jury shall be as heretofore, and the right shall remain inviolate.' What can this mean, but that the right of having controverted questions of fact in common-law cases decided by a jury, should be beyond the reach of any department of the Government, whether it be the legislature, the executive, or the judiciary. This was the right which had always been enjoyed before, and if the constitutional provisions were not intended to protect that right in all its length and breadth, they can mean nothing. * * * It cannot mean that the legislature may confer upon the courts 'the power of trying according to the course of chancery, any question which has always been triable according to the course of the common law.'
>
> "No power in our Government can take from the litigant the right to have his case tried by a jury, substantially in the mode and with the same effect as that which belonged to jury trials in similar cases, when the Constitution of 1776 was adopted. * * * What is law and what is equity is a judicial question. * * * The judiciary, no more than the legislature, can deny to any litigant the right of trial by jury, in a case appropriate to such a mode of trial."

In Byers *vs.* Commonwealth, 42 Pa. St., 89, it was held:

> "That the constitutional provision relative to trial by jury was intended to preserve that right as it existed at the formation of our State government, and not to increase or extend it, and must be construed with reference to the statutes that were in force in England, and in the province of Pennsylvania, at the adoption of the first constitution of the State."

To the same effect is Hawes *vs.* Levin, 51 Pa. St., 412.

In Tabor *vs.* Cook, 15 Mich., 322, Judge COOLEY, in passing upon the right of trial by jury under the constitution of that State, said (page 325):

"The present is one of those cases where a right to a trial by jury existed when the constitution was formed; and this right must therefore 'remain.' Whatever proceeding the legislature authorizes for the determination adverse claims, the right of the party in possession to have a jury trial must be kept in view, and some mode pointed out by which he can demand it. The intention here [in the Michigan constitution] is plain; to preserve to parties the right to have their controversies tried by jury, in all cases where the right then existed."

Citing Work *vs.* State, 2 Ohio, 296.
Norval *vs.* Rice, 2 Wis., 22.
Exline *vs.* Smith, 5 Cal., 112.
Hughes *vs.* Hughes, 4 Monr., 43.
See also Supervisors *vs.* Dunning, 20 Wis., 210.

In Risser *vs.* Hoyt, 53 Mich., 185, an act to prevent debtors from giving preferences to creditors was held void because it empowered the court to hear and decide upon questions of fact without the intervention of a jury, in violation of section 27, article 6, of the constitution of Michigan, which provides that "the right of trial by jury shall remain" when demand by one of the parties to the controversy is made.

The act authorized the probate judge to hear and determine summarily the question of the insolvency of the debtor, the giving or attempting to give preferences, and his refusal or neglect to make assignment of his property, and it made the orders and judgments of the court final. If the court determined the questions adversely to the debtor, he was required to appoint a receiver to take possession of the property of the debtor, and convert it into money and distribute it among the proper creditors.

Respecting the objection that the law denied the right of trial by jury, the court says that these inquiries (above stated) "involved valuable property rights under the act, and affect the citizen in the possession, control, and disposi-

tion of his property. They involve questions of fact which are proper to be submitted to a jury" (page 195).

The court comments on the decision in Weston *vs.* Loyhed, 30 Minn., 221, which upheld a similar act of that State, saying (bottom page 199):

> "It needs no argument to demonstrate how inapt this reasoning is to the framework of government under which legislative and judicial power is exercised in this State. It concedes that a proceeding in accordance with the statute would not be 'due process of law,' but deficiencies in the legislative act are to be supplied by the court as occasions arise, and the court is 'to devise and direct such a course of procedure that the object of the law may be accomplished.' Another provision of our constitution stands in the way of adopting this decision as a correct exposition of the law. The judiciary are prohibited from exercising legislative functions."

The court continues, bottom page 200:

> "The reason assigned by the [Minnesota] court that the act is a new one, creating a new tribunal whose proceedings are not 'at law' or according to the course of the common law, but special in their nature, corresponding more nearly to a court of equity, does not appear to me to be sufficient to uphold the constitutionality of the law as against the objection made. It was against the enactment of new laws which ignored the proceedings according to the course of the common law, and provided summary methods of determining legal rights, that the protecting shield of the Constitution was required. The true criterion is, Does the act destroy or materially impair the right of trial by jury according to the course of the common law, in cases proper for the cognizance of a jury? The nature of the controversy between the parties, and its fitness to be tried by a jury according to the rules of the common law, and not the nature of the tribunal, nor the summary mode of proceeding therein, should decide the question."

Again, middle page 201:

"In People *vs.* Lawton, judge of probate, 30 Mich., 386, this court held that a law was not enforceable unless it furnished adequate means to secure the purposes for which it was enacted. The fault in that case was the failure to provide for a jury to try the charge in the probate court."

Bottom page 202:

"I do not decide that there are not many questions which might be raised under this statute which it would be competent for a court to decide without the intervention of a jury, and I confine myself to those which are of common-law cognizance, as distinguished from those of an equitable nature. For instance, under section 2 of this act two facts, at least, must concur before the debtor can be deprived of his property: 1. He must owe three or more debts, two at least amounting in the aggregate to not less than $200; 2. He must have done some act, or omitted to do some act, which this section prescribes shall entitle two or more creditors to file a petition. These acts are treated as a fraud upon the rights of other creditors, and constitute the gist of the proceedings. Such issues, involving the elements of fraud both as to the debtor and creditor alleged to have been preferred, are such as are peculiarly appropriate for a jury, and the right to have such trial cannot be taken away by a summary proceeding of this kind. There is a class of cases where it is competent to enter judgment upon motion without the intervention of a jury, such as upon appeal bonds, recognizances, and the like; but in these cases the breach is known to the court as matter of record, and there can be no matter of fact *in pais* to be tried. In such cases no constitutional right is violated.

"From what has been said concerning the deprivation of the right of trial by jury, it is apparent that the act deprives parties of their property without due process of law. * * * The method of inquiry is not according to the course of the common law. In no proper sense is a trial had at all."

Replying to the contention that the courts of Minnesota had sustained a law similar to the statute under consideration, Mr. Chief Justice COOLEY said (bottom page 209):

> "It is said that a statute similar to this has been sustained in Minnesota. But it does not necessarily follow that the same statute would be sustained here. The Minnesota system of judicial procedure is quite different from ours, and such an act may perhaps receive help in that State from other statutes and from the code of procedure which it could not have here. In this State such an act must fail unless it is sufficient in itself; for it does not come in as a part of any existing system, and has nothing else in the statutes to supply its deficiencies."

The case of Work *vs.* Ohio, 2 Ohio St., 296, was one involving the constitutionality of an act of that State providing for a jury of six persons in the trial of criminal prosecutions in the probate courts.

It was held that the essential and distinguishing features of the trial by jury as known at the common law and generally, if not universally, adopted in this country were intended to be preserved and all its benefits secured to the accused in all criminal cases by the Ohio constitution.

Respecting the character of this right, the court, speaking by RANNEY, J., says (middle page 302):

> "What, then, is this right? It is nowhere defined or described in the Constitution. It is spoken of as something already sufficiently understood, and refers to it as a matter already familiar to the public mind. * * * If ages of uninterrupted use can give significance to language, the right of jury trial * * * stand as representatives of ideas as certain and definite as any other in the whole range of legal learning."

In the case of Turnpike Co. *vs.* Parks *et al.*, 50 Ohio St., 568, it was held that a statute of that State which attempted to authorize the probate judge of a county to declare a turnpike road abandoned and vacated as a toll road

without the intervention of a jury or the right of appeal was in violation of section 5, article 1, of the Ohio constitution, which provides that "the right of trial by jury shall be inviolate." Before the road could be vacated it was necessary for the court to find that it had been out of repair for at least six months, when, upon the finding of the probate court, the road should be deemed vacated and become a free road. Respecting the finding to be made by the probate judge, the supreme court, speaking by DICKMAN, J., says (page 577):

> "To determine the existence of a state of facts upon which to base a destruction of property rights and interests, strict regard should be had in the investigation to the methods and safeguards prescribed by the Constitution."

Page 578:

> "At common law the want of reparation of highways, when visited with fine, penalty and forfeiture, was the subject of inquiry by a jury."

Page 581:

> "In the Federal courts it is the accepted doctrine, that while actions *in rem* in admiralty property may be divested from an owner without the verdict of a jury, yet, in any proceeding at common law, even proceedings *in rem*, a citizen of the United States cannot be divested of his property except by verdict of a jury, under due process of law, in a proceeding in which he is in some manner a party, having opportunity to be heard, and having a day in court."
>
> "Upon reason and the weight of authority, we are of opinion, that in the case at bar the plaintiff in error was entitled to a jury in the probate court; that to deprive the turnpike company of the right to demand and receive toll for the use of its road without a trial by jury, would be to take its property without due course or process of law."

The claims asserted here are based upon contracts, upon which, it is obvious, a common-law action would lie. Suppose the creditors were asserting their claims against the parties who contracted with them. Will it be contended that, under the common law, the debtors would not be entitled to a trial by jury? Can the legislature, as against them, destroy that right by providing a special method for the collection of the claims? Can it by shifting the burden upon other persons, not parties to the contracts, deny to those upon whom it is shifted the same rights as were possessed by the contracting debtors? The legislature is without power to deprive either the contracting debtors or the city of that right. The right existed under the common law; is protected by the Constitution, and the legislature cannot destroy it merely by changing the remedy for enforcing the collection of the debt. It is therefore respectfully submitted that the statute under discussion in attempting to fix upon the City of Guthrie a liability for these claims is in violation of the seventh amendment to the Constitution of the United States, in that it does not provide for or contemplate the determination of such question of liability by a jury.

IV.

The act is special legislation and violates the provisions of the act of Congress of July 30, 1886 (24 Stats., 170).

The act is a special one, and therefore in violation of the act of July 30, 1886, chapter 818 (24 Stats., 170), which forbids the legislature of a Territory from passing any special law where a general law can be made applicable, and the passing of any local or special law regulating practice in the courts of justice.

(*a.*) In discussing the question of the denial by this act of due process of law it was necessary to point out in detail its provisions. It is classed in the statutes as "chapter 14, article 1." By its express provisions it can apply only to the indebtedness created by the people of the four provisional governments named. In this respect it is contrary to that provision of the act of July 30, 1886, which forbids the passing of a special law where a general law can be made applicable.

The purpose of the act as expressed in its title is to provide a method for the determination of the existence and validity of indebtedness incurred by the four provisional governments named. In order to have made the act one of a general nature, it was at least necessary that it should apply to all indebtedness incurred by provisional governments within the Territory, which would have made it apply to a particular class of claims. We fail to perceive such a distinction in character between the indebtedness incurred by these particular so-called governments and any other indebtedness, or between debts of the kind in question incurred by any other provisional governments within the Territory.

A law to accomplish the purpose desired could have been so framed as to have provided a remedy for the ascertainment and settlement of the indebtedness incurred by all provisional governments in the Territory. That other similar governments incurred indebtedness is apparent by a reading of article 2 of chapter 14, Oklahoma Statutes, another special law, providing for the ratification, confirmation, and payment of the indebtedness incurred by the provisional government of the city of Kingfisher.

It is submitted that there is no ambiguity in the language used in the act, and that the words must be given their ordinary meaning; that the act forms no part of the general code of civil procedure, but must be considered as complete in itself, and that therefore it is special legislation.

"A law of a general nature is one which operates alike upon all within a particular class. A law is not general in any correct sense of the term, but is special, where it is suspended in one locality, where exists a proper subject-matter on which to operate, but is in full force in another locality of exactly the same kind. This uniformity is in the sense that the law shall operate the same in all parts of the State under the same circumstances and conditions. Such law must embrace all and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class" (Ohio *ex rel. vs.* Board of Elections, just decided).

This language of the Ohio circuit court exactly fits the case at bar; but even if the act were so framed that it would include the indebtedness incurred by all provisional governments, we do not concede that it would then be general, inasmuch as its subject-matter would still be claims or indebtedness.

(*b.*) *A new forum created.*

Again, it attempts to create a new forum, if such it may be called, in which to adjudicate these particular claims, in violation of the act of July 30, 1886 (24 Stats., 170). It creates a commission consisting of three persons, who shall be appointed by the district judge of Logan county. The commissioners are required to give ten days' notice in a newspaper of the time and place of hearing the claims, and the persons must present their claims within 30 days from the date of the first publication of the notice or be forever cut off from asserting them. After the commission has passed upon them, they are required to be submitted to the district court for approval or disapproval. If the judge approves, they are to be certified to the mayor and council of the city and warrants are to be issued therefor. This is the complete method of procedure provided. There is no state-

ment, nor reference, nor even intimation, that, after approval or disapproval by the judge, an appeal or writ of error may be taken or allowed. Had the legislature so intended, such intention would have been expressed in the act.

It is to be observed that it is the district judge, and not the district court, who appoints the commissioners and approves or disapproves of their finding. The power attempted to be exercised by the commissioners in determining the validity of these claims was judicial in its nature. If so, then the legislature attempted to create an additional court or forum for their hearing and determination, and so contravened the provisions of the act of July 30, 1886, *supra.*

(c.) *In this respect the act violates section 9 of the organic act of the Territory, which provides a complete system of judicial machinery for the hearing and trial of all matters proper to be submitted and determined by the courts.*

The act is classed in the statutes of Oklahoma as article 1, section 14. It bears no relation to, nor does it make any reference to, the general code of civil procedure. The general code is embraced in sections 3873 to 4638, inclusive, of the Statutes of Oklahoma. There is nothing in the act which, even by implication, refers thereto or indicates an intention on the part of the legislature to provide or require that, after the finding and report to the district court by the commissioners or referees and the approval or disapproval of their report by the district judge, the matter could then be taken on error or appeal and proceed as a matter arising under the general code. The language of the act is that "all claims allowed and approved by the district judge shall be certified to the mayor and council of the village of Guthrie, who are hereby authorized and directed to issue warrants upon the village and payable by the villages to the holders and owners," and requiring their payment in installments. The act then provides that the mayor and

council of the villages shall levy a tax upon the property of the residents of the villages to pay the warrants issued for the amounts found by the commission to be due upon the claims. If it were intended that an appeal or writ of error should be allowed, what necessity was there to provide the special board or tribunal to hear and determine the matters in the first instance? It was evidently intended that the act should be complete in itself, and for this reason the legislature, in attempting to pass such a law and to provide a new and additional tribunal to determine matters essentially judicial in their nature, violated the section of the organic act referred to.

(*d.*) *Judicial power is attempted to be conferred.*

If the general rules in the interpretation of statutes, that where there is no ambiguity the words shall be given their ordinary meaning, and that where a special act is passed on a particular subject the general law must be construed as not applying to the cases embraced by the special act, govern in this matter, then the legislature attempted to create a new tribunal in violation of the organic act, for the powers attempted to be exercised by the commissioners were judicial in their nature, and such as can only be exercised by a court.

What, then, is judicial power when applied to the subject-matter of this act?

In Murray's Lessees *vs.* Hoboken Land & Improvement Co., 18 How., 272, this court, speaking by Mr. Justice CURTIS, exhaustively discusses the nature of judicial power, and points out the distinction between what constitutes that power when exercised in the enforcement of different rights in favor of the Government and the acts of an officer when passing upon a controversy between private parties. On page 284, in speaking of the power of Congress, he says:

"To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law," etc.

The same limitation upon the power of the legislature of a State applies which limits the power of Congress to destroy or take away this right.

Further, the court say:

"It is true, also, that even in a suit between private persons to try a question of private right, the action of the executive power, upon a matter committed to its determination by the Constitution and laws, is conclusive."

But this is because the power is given in the Constitution, and the law only points out the method of its exercise. But where the power is not expressly given in the Constitution, no act of Congress or of a legislature can confer it.

In Musser *vs.* Adair, 55 Oh. St., 466, the court, speaking by MINSHALL, J., discusses judicial power and says (bottom page 471):

"Whether the power [to hear and determine] is judicial or not depends not only upon the nature and character of the question, but upon the manner and circumstances under which it is to be determined. * * * Judicial powers are those conferred on judges as courts in the hearing and determination of questions arising in litigation between parties in actions pending before them (bottom page 472, citing numerous decisions).

Page 473:

"A county auditor cannot be empowered to hear and determine an issue between A and B as to title to land, or to a horse, or as to whether A should recover of B a certain sum of money. These are judicial questions

and can only be determined in a proper proceeding by a court."

See also State *ex rel. vs.* Harmon, 31 Ohio State, 250.

Decamp *vs.* Archibald, 50 Ohio State, 618, 625.

In Elliott on Appellate Procedure, section 8, it is said:

"Judicial power can only reside in courts, although powers in their nature judicial may be conferred upon ministerial officers. The power to decide controversies between litigants is strictly judicial, but judicial power is not confined to the sole act of deciding or of giving judgment, for judicial power extends beyond the simple act of deciding or adjudging, and embraces many incidents connected with the administration of justice."

See also Cooley's Const. Lim. (6th ed.), page 108.

(*c.*) *The hearing before the commissioners and the action of the district judge in approving or disapproving their findings was in no sense a judicial hearing or determination.*

If the action of the commissioners in determining the validity of the claims was not of a judicial character, then in no sense was there a trial had upon these claims. Can it be said that in reviewing the action of the commission the action of the district judge is a judicial determination of a controverted matter? No authority is given him to retry or rehear. He simply examines the report submitted to him and approves or disapproves. Nowhere in the act is the commission given authority to make or enforce any order, to require the production of any books or papers, to administer oaths, to issue process and compel witnesses to appear and testify, or to punish a witness for refusing to testify. As has been argued *supra*, these are but naked legal claims—legal solely because of this act of the legislature. At common law a party against whom such a claim is as-

serted is entitled to have his rights determined according to the ordinary mode of judicial procedure, with the opportunity to be heard in his defense. This is the trial afforded by the common law and protected by the Constitution. The legislature cannot abridge this right nor change the character of the claim by changing the remedy for enforcing it. It is nothing more than an action on a contract, which is cognizable at common law. The city is entitled to have these matters tried before a judicial tribunal. These commissioners possessed no judicial power whatever; nor could such power be conferred upon them. In no sense was there a trial had before the commissioners. The judge acted upon their report. He had no power to go outside the record. His duty was to review, not to retry.

V.

The claims not valid against the city.

The claims and demands which are the basis of this proceeding, contracted by the persons assuming to act as officers of the provisional governments of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, are not valid claims upon the city of Guthrie. Not having been incurred by the officers of either a *de jure* or *de facto* government, they are valid only as against the persons who contracted them.

In proceeding to discuss this proposition, it becomes necessary to a proper determination of the question to look to the character of the so-called provisional city governments. When the Territory was thrown open for settlement there was no law in existence providing for the organization of any kind of a municipal government therein, and no such authority existed until the passage by Congress, on May 20, 1890, of the organic act of the Territory. In the settlement of the Territory town sites were established by the settlers

who secured lands most advantageously situated for such purpose. These sites were surveyed and laid out into squares and blocks and lots, with streets and alleys. The people gradually gathered at the places chosen as sites for cities, and formed quite large communities. There being no law for the organization of cities and towns, the people of these communities formed what afterwards became known as provisional governments. They chose from among themselves persons to act in the capacity of officers of these voluntary organizations, which persons attempted to discharge the duties and functions of officers of so-called cities and villages. In this manner were formed the provisional governments of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, which immediately adjoined each other. The persons chosen by the people of these communities to act in the capacity of officers and to discharge the functions devolving upon officers of legal municipalities in carrying on these so-called governments incurred a large amount of indebtedness, without the power or authority to create a fund by taxation or otherwise with which to pay off the indebtedness so incurred. The claims involved in this controversy were incurred by the persons assuming to act as officers of these four provisional governments.

On behalf of the City of Guthrie it is contended that these so-called provisional governments had no existence in law, but were the mere voluntary associations of individuals, existing wholly without authority of law. They were mere voluntary communities of individuals assuming to take upon themselves the functions and powers of government without authority to enforce any act of government. The debts contracted by their so-called officers were the debts of the persons making the contracts, who alone are liable for their payment, because the persons assuming to act as officers were neither *de jure* nor *de facto* officers.

The question of the legal status of these provisional governments now included within the city of Guthrie has been

before the courts of the Territory of Oklahoma on several occasions. Respecting their legal character, the Supreme Court, in the case of Guthrie *vs.* Territory *ex rel.*, 1 Okla., 188, said (bottom page 193):

"It is a well established rule of law that before there can be a *de facto* municipal corporation there must be some authority for a *de jure* corporation. A *de facto* corporation cannot exist where there is no law authorizing a *de jure* corporation (Norton *vs.* Shelby Co., 118 U. S., 426; Evenson *et al. vs.* Ellingston *et al.*, 67 Wis., 634).

"'The proposition which lies at the foundation of the law of corporations of this country is that here all corporations, public and private, exist and can exist only by virtue of express legislative enactment, creating or authorizing the creation or existence of the corporate body. Legislative sanction is with us absolutely essential to lawful corporate existence' (Dillon, Mun. Corp., sec. 37).

"Was there any legislative sanction to the existence of municipal corporations prior to the act of Congress, approved May 2, 1890? We are unable to find any such authority. These provisional governments grew out of a necessity made by the absence of legal authority. They were aggregations of people associated together for purposes of mutual benefit and protection. Without any statute law, they became a law unto themselves and adopted the forms of law and government common among civilized people, and enforced their authority by the power of public sentiment. They had no legal existence; they were nonentities; they could not bind themselves by contracts, or bind any one else."

To this effect are the decisions in the cases of Oklahoma City *vs.* Richardson Lumber Co., 3 Okla., 5; Bank of Guthrie *vs.* McElhinney, 5 Okla., 107, and Guthrie *vs.* Wylie, 55 Pac. Rep., 105.

"While acts of a *de facto* incumbent of an office lawfully created by law and existing are often held to be binding from reasons of public policy, the acts of a per-

son assuming to fill and perform the duties of an office which does not exist *de jure* can have no validity whatever in law" (Norton *vs.* Shelby Co., 118 U. S., 425).

"But it is contended that if the act creating the board was void, and the commissioners were not officers *de jure*, they were nevertheless officers *de facto*, and that the acts of the board as a *de facto* court are binding upon the county. This contention is met by the fact that there can be no officer, either *de jure* or *de facto*, if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence (Norton *vs.* Shelby Co., 118 U. S., 441).

"There must be a legal office in existence, which is being improperly held, to give to the acts of such incumbent the validity of an officer *de facto*" (*supra*, bottom page 444).

To the same effect is the decision in the case of Carleton *vs.* People, 10 Mich., 250, 259.

This court, in the case of Shapleigh *vs.* San Angelo, 167 U. S., 646, 658, refers to the case of Norton *vs.* Shelby Co. (118 U. S., 425) with approval.

In Comanche Co. *vs.* Lewis, 133 U. S., 198, 202, it was said that, although the legislature of Kansas had the power to cure all defects in the organization of a county, the court expressly held that "there must be a *de facto* organization upon which this recognition may act," citing 12 Kansas, 441, 446.

Further upon this point, see—

Wyandotte County *vs.* Kansas City, 47 Pac. Rep., 326.

While the legislature has undoubted power to compel municipal bodies to perform their functions as local governments under their charters, it has no power against the will of the corporation to compel it to assume obligations not within the ordinary functions of municipal government. The State in such cases may remove restrictions and permit

action, but cannot compel it (Cooley's Const. Lim. (6th ed.), pages 283–285).

So far as a municipal corporation is endowed with the power of contracting and of acquiring and disposing of property, it stands on the same ground of exception from legislative control and interference as a private corporation or individual. The legislature has no more right to impose the burden of paying these claims upon the City of Guthrie than it has to impose that burden upon private individuals. But, admitting that it does possess that power, it cannot require payment by the city of indebtedness not incurred for municipal purposes (People *ex rel* McCagg *vs.* Mayor, 51 Ill., 17; State *ex rel. vs.* Tappan, town clerk, 29 Wis., 664; Atkins & Co. *vs.* Town of Randolph, 31 Vt., 226; Hampshire *vs.* Franklin, 16 Mass., 76; Bank *vs.* McIlhinney, 5 Okla., 111).

As to third persons who seek to enforce pecuniary liabilities against towns, arising upon contract, such towns are merely private corporations or individuals and possess the same rights possessed by individuals (State *ex rel. vs.* Tappan, 29 Wis., 664).

It is to be noted that this act attempts to impose upon the city the payment of not only the claims incurred for municipal purposes, and for which the city derived some benefit, but (sec. 1) attempts to impose upon it the payment of "all claims and demands of every character * * * issued by the city governments * * * for all purposes."

If it be contended that the city received benefit from the contracts upon which the claims are based, and therefore in equity should pay them, why should it be compelled to pay for that from which it derived no benefit—that is, for that which was not a lasting benefit, but in which the benefits terminated at the termination of the services rendered? What benefit did the city and citizens of the city derive from the services of a person assuming to act as mayor, marshal, city clerk, or city treasurer, or for legal services rendered (Rec., pp. 22, 26), or for a medal for services rendered, and

for similar claims against these so-called provisional governments which in law had no existence whatever? These provisional governments were organized without authority of law and in the absence of any law authorizing the incorporation of any municipality. The liabilities incurred were therefore personal liabilities upon those who incurred them, and they cannot be changed into liabilities upon the municipality which ensued and which became such under the law when the law authorizing the creation of municipal corporations was enacted.

If the legislature possesses this power, then it may compel a citizen to pay debts contracted by private persons and from which the citizen has and can derive no benefit whatever.

For the convenience of the court the material portions of the statutes cited are printed in the appendix.

Reply to the Brief for Plaintiff in Error and Appellee.

(1.) The first point made by counsel for the plaintiff in error is (Brief, p. 12) that the territorial court erred in its conclusion that the test of the four per cent. limit of indebtedness should be applied at the date of the issuance of the warrants, and not of the date of the passage of the act of July 30, 1886.

While this question was raised before the district judge (Rec., p. 8), it was not decided by the court, the ground for the dismissal of the proceedings being (Rec., p. 29) that the law under which the proceedings were had was void. How the question becomes material here is not apparent. The question before this court is the validity of chapter 14, article 1, Statutes of Oklahoma, and not the proper construction to be placed upon the act of July 30, 1886.

(2.) The next contention is that the court erred in its

conclusion that the legislature could not impose the payment of these claims upon the city of Guthrie.

The Oklahoma case cited in support of this contention has been overruled. The other cases cited do not answer the objection made. All the court there decides is that the legislature may legalize the acts of *de jure* officers when they have exceeded their power in issuing bonds, and this on the theory that the municipalities have received the proceeds of the bonds, and in any event could be compelled to refund the money received if the bonds were illegal.

The question here is whether the legislature may shift the liability incurred by private persons and impose it upon a city, irrespective of whether it has received any benefit from the transactions.

(3.) Next the claim is made that there is nothing in the act which prohibits the taking of an appeal or writ of error from the order of the district judge; that such action may be taken under the general code and the organic act.

The answer is, there is nothing in the act indicating an intention to permit an appeal. The act, being a special remedy, unambiguous in its terms, must be held to stand alone, and to permit no appeal under the general laws.

Again, a court can only review the judgment of a court (Musser *vs.* Adair, 55 Ohio St., 470). Under this act the court could not render a judgment. All it was authorized to do was to approve or disapprove the finding of the commissioners, a finding which had no judicial force whatever. Under the general code a judgment is based upon a trial or a judicial finding. Here there was neither. If the general statute providing for appeals and writs of error applies in this case, then the other statutes regulating the other steps to be taken must apply, and they were not in this instance complied with.

Again, section 9 of the organic act forms no part of the system of judicial procedure for the Territory. It simply

provides a system of courts, leaving to the legislature full power, subject to certain conditions and restrictions, to provide the modes of proceeding in those courts (Hornbuckle *vs.* Toombs, 18 Wall., 655, 656), and is a standard for determining whether the modes provided are proper.

(4.) To the contention that the act does not deny the right of trial by jury, after the action of the commissioners and district judge, it may be said there is nothing in it which would give that right. After the district judge has passed upon the action of the commissioners, if approved by him, the claims are required to be certified to the city officers and warrants issued. It would be doing a vain thing to try a cause to a jury after the court in which it was pending had passed upon it.

(5.) Respecting the next point made, it may be said that, at common law the validity of the claims in suit would be properly triable by a jury. The constitutional provision is intended to preserve that right wherever it existed under the common law. The legislature cannot destroy the right by changing the remedy. If so, then the legislature may destroy the right and deny the right of trial by jury in all civil matters. The test is whether at common law the matter would be triable to a jury.

(6.) It is insisted that the shadowy character of some of the claims cannot be raised here in order to question the right of the legislature to pass the act; that that question was for the lower court to deal with.

Deal with how? What power was there in the district court to determine their shadowy character? All that court was empowered to do was to approve or disapprove the action of the commissioners—that is, act as a board of review. The city did object (Rec., p. 8) to the shadowy character of some of the claims, charging that some were fraud-

ulent in their inception, and others beyond the power of municipal officers to incur; but what judicial machinery was provided to determine those facts? None whatever. The commissioners could not administer oaths, and were absolutely without power to make or enforce any order whatever. It is asserted that these are equitable claims which the city should be compelled to pay; but, if so, the city certainly should be afforded a proper method for determining what claims are just and proper to be paid.

It is respectfully submitted that if this court determines it has jurisdiction to review the action of the territorial courts, then the judgment of the supreme court of Oklahoma should be affirmed.

W. J. HUGHES.
JOHN L. LOTT.

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APPENDIX.

STATUTES OF OKLAHOMA, 1890.

CHAPTER 14.—*City Indebtedness.*

"AN ACT for the purpose of providing for the allowance and payment of the indebtedness heretofore created by the people and cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, now consolidated into the village of Guthrie." [Took effect December 25, 1890.]

Article 1.—Guthrie, East Guthrie, West Guthrie, and Capitol Hill.

(553.) SECTION 1. That the district judge of Logan county is hereby empowered to appoint three disinterested persons to act as a commission or referees to inquire into and pass upon all claims and demands of every character heretofore issued by the city governments mentioned in the caption of this act, for all purposes.

(554.) SEC. 2. That the owners and holders of any kind of scrip, warrants or other evidence of indebtedness heretofore issued by the city governments of Guthrie, East Guthrie, West Guthrie and Capitol Hill, shall present their claims to the commissioners or referees, to be appointed by the district judge, under oath, stating that the same is a *bona fide* claim, that they performed the labor or advanced the money or furnished the materials or purchased same for a valuable consideration, and that they believe the city, issuing the same did so for necessary expenses incurred in running the city government, and said master shall hear further evidence if he deem necessary before allowing the same.

(555.) SEC. 3. The commission or referees shall keep a record of all claims filed with them for allowance and keep their office open during the hours of nine o'clock in the morning and four o'clock p. m., and shall be allowed sixty days to hear and determine all claims, or longer if the district judge so orders. Said commission or referees shall immediately after this appointment extend ten days' notice in

some newspaper published in the village of Guthrie, notifying all parties holding or owning any claims mentioned in this act to present the same to them for allowance; and all persons who fail to present their claims within thirty days from date of first publication mentioned in this section shall be forever precluded from so doing hereafter.

(556.) SEC. 4. That after the commission or referees shall have passed upon and allowed any and all claims mentioned in this act, they shall make a report to the district court of same showing the names and amounts allowed by them and also all claims and the names of persons and amounts disallowed by them, for approval or disapproval of the district judge. And all claims allowed and approved by the district judge shall be certified to the mayor and council of the village of Guthrie, who are hereby authorized and directed to issue warrants upon the village and payable by the village to the holders and owners, payable in installments each of the amounts to be in one, two, three, four and five years to bear interest at the rate of six per cent. per annum from the date of the allowance by the commission or referees, and said mayor and council of the village of Guthrie shall levy a tax upon the property of the residents of said village to pay the warrants herein referred to, levying same upon each subdivision heretofore constituting Guthrie, East Guthrie, West Guthrie and Capitol Hill according to the amount of indebtedness created by the city councils, the mayors and school boards, heretofore acting for and in behalf of the people resident of said cities. Each of said cities to be liable for and taxable under this act for the amount of indebtedness created by them.

(557.) SEC. 5. That said commission or referees shall be allowed such compensation as the district judge may allow them for the services to be performed by them under this act, and the village of Guthrie shall pay the same to the said commission or referees upon the order of the district judge.

ORGANIC ACT, TERRITORY OF OKLAHOMA.

(Approved May 2, 1890; 26 Stats., 81.)

SECTION 9. That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace. The supreme court shall consist

of a chief justice and two associate justices, any two of whom shall constitute a quorum. They shall hold their offices for four years, and until their successors are appointed and qualified, and they shall hold a term annually at the seat of government of said Territory. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of the justices of the peace, shall be as limited by law: *Provided*, That justices of the peace, who shall be elected in such manner as the legislative assembly may provide by law, shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars; and said supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction, and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property. Said Territory shall be divided into three judicial districts, and a district court shall be held in each county in said district thereof by one of the justices of the supreme court, at such time and place as may be prescribed by law, and each judge after assignment shall reside in the district to which he is assigned. The supreme court shall define said judicial districts, and shall fix the times and places at each county-seat in each district, where the district court shall be held and designate the judge who shall preside therein. And the territory not embraced in organized counties shall be attached for judicial purposes to such organized county or counties as the supreme court may determine. The supreme court of said Territory shall appoint its own clerk, who shall hold his office at the pleasure of the court for which he is appointed. Each district court shall appoint its clerk, who shall also be the register in chancery, and shall keep his office where the court may be held. Writs of error, bills of exception, and appeals shall be allowed in all cases from final decisions of said district courts, to the supreme court under such regulations as may be prescribed by law, but in no case removed to the supreme court shall trial by jury be allowed in said court. Writs of error and appeals from the final decisions of said supreme court shall be allowed and may be taken to the Supreme Court of the United States, in the same manner and under the same regulations as from

the circuit courts of the United States, where the value of the property or the amount in controversy to be ascertained by oath or affirmation of either party or other competent witnesses, shall exceed five thousand dollars; and each of said district courts shall have and exercise, exclusive of any court heretofore established, the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States. In addition to the jurisdiction otherwise conferred by this act, said district courts shall have and exercise exclusive original jurisdiction over all offenses against the law of the United States committed within that portion of the Cherokee outlet not embraced within the boundaries of said Territory of Oklahoma as herein defined, and in all civil cases between citizens of the United States residing in such portion of the Cherokee outlet, or between citizens of the United States, or of any State or Territory, and any citizen of or person or persons residing or found therein, when the value of the thing in controversy or damages or money claimed shall exceed one hundred dollars; writs of error, bills of exceptions, and appeals shall in all such cases, civil and criminal, be allowed from the district courts to the supreme court in like manner, and be proceeded with in like manner as in cases arising within the limits of said Territory. For all judicial purposes as herein defined such portion of the Cherokee outlet not embraced within the boundaries of the Territory of Oklahoma shall be attached to, and be a part of, one of the judicial districts of said Territory, as may be designated by the supreme court. All acts and parts of acts heretofore enacted, conferring jurisdiction upon United States courts held beyond and outside the limits of the Territory of Oklahoma as herein defined, as to all causes of action or offenses in said Territory, and in that portion of the Cherokee outlet hereinbefore referred to, are hereby repealed, and such jurisdiction is hereby given to the supreme and district courts in said Territory and in the Cherokee outlet, prior to the passage of this act, shall be tried and prosecuted, and proceeded with until finally disposed of, in the courts now having jurisdiction thereof, as if this act had not been passed. The said supreme and district courts of said Territory, and the respective judges thereof, shall and may grant writs of mandamus and *habeas corpus* in all cases authorized by law; and

he first six days of every term of said courts, or so much hereof as shall be necessary, shall be appropriated to the rial of causes arising under said constitution and laws; and rits of error and appeals in all such cases shall be made to he supreme court of said Territory, as in other cases.

CHAPTER 818, U. S. Statutes; 24 Stat. at Large, 170.

Approved July 30, 1886.

SECTION 1. That the legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say:

Regulating the practice in courts of justice.

* * * * * * *

In all other cases where a general law can be made applicable, no special law shall be enacted in any of the Territories of the United States by the territorial legislatures thereof.

* * * * * * *

SECTION 4. That no political or municipal corporation, county, or other subdivision in any of the Territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county or subdivision, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void, etc.

GUTHRIE NATIONAL BANK *v.* GUTHRIE.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 133. Submitted January 13, 1899.—Decided April 3, 1899.

In ascertaining the jurisdictional amount on an appeal to this court, it is proper to compute interest as part of the claim.

Whether a general law can be made applicable to the subject-matter, in regard to which a special law is enacted by a territorial legislature, is a matter which rests in the judgment of the legislature itself.

The statute in question in this case creates a special tribunal for hearing and deciding upon claims against a municipal corporation, which have no legal obligation, but which the legislature thinks have sufficient equity to make it proper to provide for their investigation, and payment when found proper, and it does not in any way regulate the practice in courts of justice, and it is indisputably within the power of the territorial legislature to pass it, and it does not infringe upon the Seventh Amendment to the Constitution.

The court has the power in the absence of statutory provisions for notice to parties, to make rules regarding it.

The President of the United States by proclamation dated March 23, 1889, 26 Stat. 1544, declared that the Territory of Oklahoma would be open for settlement on April 22, 1889, subject to the restrictions of the act, approved March 2, 1889, c. 412, 25 Stat. 980, 1004. By that act the lands were to be disposed of to actual settlers under the homestead laws only, and until the lands were open for settlement under the proclamation of the President no person was permitted to enter upon or occupy the same.

By the act, approved May 2, 1890, c. 182, 26 Stat. 81, Congress provided a temporary government for the Territory, and by the act, approved May 14, 1890, c. 207, 26 Stat. 109, provision was made for townsite entries.

From the opening of the Territory, under the proclamation of the President, down to the passage of the act of May 2, 1890, Congress failed to establish any government for it. During that period settlers had come into the Territory and a number

of townsites had been located and settled upon by them. Many persons located and took up their residence upon the land contained in the present boundaries of the city of Guthrie. The lands were surveyed into streets, alleys, squares, blocks and lots, and what were known as provisional municipal governments were formed. By the general consent of these residents four distinct provisional municipal corporations or villages, denominated Guthrie, East Guthrie, Capitol Hill and West Guthrie, comprising some 320 acres each, were created. They were all without any law governing them, although officers were selected by the people occupying the lands, and a form of government was carried on by a kind of mutual understanding. The persons chosen as officers incurred indebtedness in administering the affairs of the municipalities, but there was no authority to raise the necessary revenues by taxation or otherwise to pay the same. These officers exercised in fact the powers usually delegated to municipal corporations. Public improvements, such as grading streets, constructing bridges, and erecting buildings were made, laws and ordinances were adopted, and offenders were punished. Schools were maintained, and the right of possession of the various claimants to town lots within their respective boundaries was regulated and certificates were issued by the local tribunals constituted by the municipal authorities for determining the rights of settlers and occupants of the various lots within the limits of the municipal governments, and the certificates thus issued were by the second section of the townsite act, above mentioned, 26 Stat. 109, to be taken as evidence of the occupancy of the holder thereof of the lot or lots therein described, except that where there was an adverse claim to the property the certificate was to be only *prima facie* evidence of the claim or occupancy of the holder.

The claims mentioned in the act of the territorial legislature hereafter spoken of arose out of these circumstances and represented the expenditures of the provisional governments for some or all of the objects above enumerated.

In December, 1890, a code of laws for the permanent government of the Territory was enacted by the territorial

legislature, and these provisional village governments, lying adjacent to one another, were incorporated under that authority into the regularly organized village of Guthrie, and on April 7, 1893, the city of Guthrie became the successor of the village of that name.

On December 25, 1890, the territorial legislature passed an act, chapter 14, of the laws of that year, for the purpose of providing a method by which to raise the necessary funds to pay the indebtedness incurred by the provisional governments of the four villages above named. The act is set forth in the margin.[1]

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[1] Chapter 14. — City Indebtedness.

An Act for the purpose of providing for the allowance and payment of the indebtedness heretofore created by the people and cities of Guthrie, East Guthrie, West Guthrie and Capitol Hill, now consolidated into the village of Guthrie.

Article I. — Guthrie, East Guthrie, West Guthrie and Capitol Hill.

Sec. 1. That the district judge of Logan County is hereby empowered to appoint three disinterested persons to act as a commission or referees to inquire into and pass upon all claims and demands of every character heretofore issued by the city governments mentioned in the caption of this act, for all purposes.

Sec. 2. That the owners and holders of any kind of scrip, warrants or other evidence of indebtedness heretofore issued by the city governments of Guthrie, East Guthrie, West Guthrie and Capitol Hill, shall present their claims to the commissioners or referees, to be appointed by the district judge, under oath, stating that the same is a *bona fide* claim, that they performed the labor or advanced the money or furnished the materials or purchased same for a valuable consideration, and that they believe the city, issuing the same, did so for necessary expenses incurred in running the city government, and said master shall hear further evidence if he deem necessary before allowing the same.

Sec. 3. The commission or referees shall keep a record of all claims filed with them for allowance and keep their office open during the hours of nine o'clock in the morning and four o'clock P.M., and shall be allowed sixty days to hear and determine all claims, or longer if the district judge so orders. Said commission or referees shall immediately after this appointment extend ten days' notice in some newspaper published in the village of Guthrie, notifying all parties holding or owning any claims mentioned in this act to present the same to them for allowance; and all persons who fail to present their claims within thirty days from date of publication mentioned in this section shall be forever precluded from so doing hereafter.

Statement of the Case.

Pursuant to the provisions of that act the district judge duly appointed the commission, which proceeded to hear the cases, and on September 1, 1891, it filed in the district court of Logan County its final report. That report contained, among other things, a reference to the various claims which were therein said to be owned by the Guthrie National Bank, and it showed the allowance of such claims, separately and in detail, and that they were all based upon warrants which had been issued by the provisional governments. The report also showed that the city attorney of the city of Guthrie appeared at the hearing and allowance of the claims and defended for the city. The amount allowed against the city in favor of the bank was $4315.22. Other claims in favor of other parties were allowed and many were disallowed by the commission. On the coming in of this report the case was docketed as a pending case in the district court, and was continued from time to time until March 17, 1893, when the bank made a motion to approve the findings of the commission as regards the claims held by it, which motion was not then decided. On April 7, 1893, the city filed exceptions to the report of the commission. Nothing further was done until March 28, 1896, at which time the city attorney filed a motion in the

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SEC. 4. That after the commission or referees shall have passed upon and allowed any and all claims mentioned in this act, they shall make a report to the district court of same showing the names and amounts allowed by them and also all claims and the names of persons and amounts disallowed by them, for approval or disapproval of the district judge. And all claims allowed and approved by the district judge shall be certified to the mayor and council of the village of Guthrie, who are hereby authorized and directed to issue warrants upon the village and payable by the village to the holders and owners, payable in instalments each of the amounts to be in one, two, three, four and five years, to bear interest at the rate of six per cent per annum from the date of the allowance by the commission or referees, and said mayor and council of the village of Guthrie shall levy a tax upon the property of the residents of said village to pay the warrants herein referred to, levying same upon each subdivision heretofore constituting Guthrie, East Guthrie, West Guthrie and Capitol Hill according to the amount of indebtedness created by the city councils, the mayors and school boards, heretofore acting for and in behalf of the people resident of said cities. Each of said cities to be liable for and taxable under this act for the amount of indebtedness created by them.

district court to dismiss the proceedings by the bank and all other proceedings based upon the act of the territorial legislature creating the commission, for the reason, as stated, that the act and all proceedings under it were void. On April 2, 1896, the matter came on for hearing upon the motion of the bank to confirm the report of the commission and the motion of the city to dismiss the proceedings, and on the last-named day the court sustained the motion of the city and dismissed the proceedings upon the ground that the act under which the commission was appointed was wholly void. This decision of the court was excepted to by the bank, and thereupon it prosecuted a writ of error from the Supreme Court of the Territory to reverse such decision. On June 11, 1897, that court affirmed the decision of the district court, and rendered judgment against the bank for costs. To reverse this judgment an appeal has been taken to and a writ of error sued out from this court.

Mr. Henry E. Asp and *Mr. John W. Shartel* for plaintiff in error and appellant.

Mr. John K. Richards, *Mr. John L. Lott*, *Mr. W. J. Hughes* and *Mr. D. R. Widmer* for defendant in error and appellee.

Mr. Justice Peckham, after stating the facts, delivered the opinion of the court.

A motion is made in this case to dismiss the appeal and writ of error on the ground that the sum involved is not sufficient to give jurisdiction to this court. Act of May 2, 1890, c. 182, 26 Stat. 81, § 9. It is claimed that the amount is less than $5000, and that this fact appears from the report of the commission, which allowed but $4315.22 as the amount due from the city to the bank.

Section 4 of the act of the territorial legislature, under which the commission acted, provides that claims which are allowed and approved by the district judge are to be certified to the mayor and council of the village of Guthrie, who are directed to issue warrants upon the village for the amounts,

which bear interest at the rate of 6 per cent from the date of the allowance by the commission, and a tax is to be levied as therein provided for the payment of the warrants.

On March 28, 1896, when the city of Guthrie filed its motion in the district court to dismiss the proceeding by the bank, over four years and six months' interest had accrued upon the claim reported by the commission, and as by the terms of the act interest was to be allowed from the filing of that report up to the time of the issuing of the warrant, which could not issue until after the report had been approved by the district court, it is plain that more interest had then accrued than was necessary to bring the amount then in issue beyond the sum of $5000. It is proper to compute interest as part of the claim. *Woodward* v. *Jewell*, 140 U. S. 247. We think this is an answer to the motion to dismiss.

Other objections are made to the act by the representatives of the city which will be noticed.

It is claimed that it violates the act of Congress, approved July 30, 1886, c. 818, 24 Stat. 170, prohibiting the passage of local or special laws in the Territories. That act, among other things, provides that where a general law can be made applicable, no special law shall be enacted in any of the Territories of the United States by the territorial legislatures thereof, and it also provides that the territorial legislatures shall not pass local or special laws in any of the cases therein enumerated, among which is a law to regulate the practice in courts of justice. Both of these provisions are said to have been violated in the passage of the act in question.

Whether a general law can be made applicable to the subject-matter in regard to which a special law is enacted by a territorial legislature, is a matter which we think rests in the judgment of the legislature itself. *State ex rel.* v. *Hitchcock*, 1 Kansas, 178, 184. That body is specially prohibited from passing any local or special law in regard to certain subjects enumerated in the act. Outside and beyond that limitation is the provision above mentioned, and whether or not a general law can be made applicable to the subject is a matter which is confided to the judgment of the legislature.

Neither does the act in this case regulate the practice in courts of justice. The prohibition of the statute of Congress relates to the passing of a law by the territorial legislature, local or special in its nature, which does in effect regulate the mode of procedure in a court of justice in some particular locality or in some special case, thus altering in such locality or for such case the ordinary course of practice in the courts.

The statute here in question is of an entirely different nature. It creates a special tribunal for hearing and deciding upon claims against a municipal corporation, which have no legal obligation, and which therefore could not be enforced in a court, but which the legislature thinks have sufficient equity and are based upon a sufficiently strong moral obligation to make it proper for it to provide for their investigation and for the payment of such as are decided to be proper, by taxation upon the property situated in the city. Such an act does not in any way regulate the practice in courts of justice.

The important question in this case is whether the territorial legislature, by virtue of the grant to it of legislative powers, had authority to create this commission and to provide for the payment of claims of the nature mentioned in the act.

By section 6 of the above-mentioned act of Congress of May 2, 1890, c. 182, 24 Stat. 81, the legislative power of the Territory extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. Some other limitations are mentioned, not material to be here considered. The same power is also granted to all the Territories by section 1851, Revised Statutes of the United States.

This territorial act was passed by the legislature with reference to the circumstances set forth in the statement of facts.

It was said by the Supreme Court of Oklahoma in *Guthrie* v. *The Territory*, 1 Oklahoma, 188, 194, that "These provisional governments grew out of a necessity made by the absence of legal authority. They were aggregations of people associated together for the purpose of mutual benefit and protection. Without any statute law, they became a law unto themselves and adopted the forms of law and government common among

civilized people, and enforced their authority by the power of public sentiment. They had no legal existence; they were nonentities; they could not bind themselves by contracts or bind any one else."

The services performed for and the materials furnished these provisional governments under the circumstances stated would certainly be regarded as proper and as beneficial, probably as absolutely necessary, for the well-being of the people living there. The villages which were subsequently incorporated under the law of the Territory succeeded to and enjoyed these benefits, and passed them on to their successor, the city of Guthrie, the present defendant in error and appellee. These facts give great force and strength to the moral consideration supporting claims of the nature here existing. Though they could not be enforced at law, the question is, whether the territorial legislature was unequal to the task of providing for their payment by the city which has received the benefit as above described.

This territorial act shows that only claims of a municipal character and of a *bona fide* nature could be allowed. It is also plain that the use of the words "district judge" therein does not mean to distinguish between the judge and the court. There being but one judge of that court the words are seemingly used interchangeably with the district court, and to mean the same as the latter expression.

We regard the power of the territorial legislature to pass this act as indisputable. It comes within the grant to that legislature contained in the act of Congress and in the Revised Statutes above cited.

In *United States* v. *Realty Company*, 163 U. S. 427, 439, the power of Congress to recognize a moral obligation on the part of the nation and to pay claims which, while they were not of a legal character, were nevertheless meritorious and equitable in their nature, was affirmed. The territorial legislature at least had the same authority as that possessed by Congress to recognize claims of the nature described. It is a legislative power, and it was granted to the territorial legislature by the acts already referred to. A city is a mu-

nicipal corporation and a political subdivision of the State, and what the State could do itself it has the power to direct its agent, the municipality, to do.

In *New Orleans* v. *Clark*, 95 U. S. 644, Mr. Justice Field, in delivering the opinion of the court, and speaking of municipal corporations, at page 653, said: "The books are full of cases where claims, just in themselves, but which, from some irregularity or omission in the proceedings by which they were created, could not be enforced in the courts of law, have been thus recognized and their payment secured." And on page 654: "A city is only a political subdivision of the State, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent which it could exercise directly; and it does this only in another way when it directs such a corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent;" citing *The People* v. *Burr*, 13 California, 343; *Town of Guilford* v. *Supervisors &c.*, 13 N. Y. 143. In the latter case the legislature passed an act directing commissioners to determine and award the amount paid and expended by certain highway commissioners, and directing the board of supervisors of the county to assess the amount thus awarded upon the taxable property of the town and to cause it to be paid in satisfaction of the claim. This was held to be a valid act, although the claim had been rejected in a suit brought to obtain its payment, and a previous legislature had passed an act directing the claim to be submitted to the electors at a town meeting, and declaring their decision should be final and conclusive, and upon such submission the claim had been rejected. It was said that the legislature of the State had power to levy a tax upon the taxable property of the town and appropriate the

same to the payment of the claim made by an individual against the town, even though the claim, to satisfy which the tax was levied, was not recoverable by action against the town; and it was held that the State could recognize claims founded in equity and justice in the larger sense of these terms or in gratitude or charity.

It is not necessary to say in this case that the legislature had the power to donate the funds of the municipality for purposes of charity alone. The facts show plain moral grounds for the act, a consideration existing in the benefits received and enjoyed by the city or by its predecessors from whom it took such benefits. The legislature might have decided the facts for itself, but instead of that it appointed this tribunal.

In *Read* v. *Plattsmouth*, 107 U. S. 568, the words of Mr. Justice Field in *New Orleans* v. *Clark*, 95 U. S. 644, were quoted with approval. In the exercise of this jurisdiction over municipal corporations by the state or by the territorial legislature, no constitutional principle is violated. It is a jurisdiction which has been customarily exercised ever since the foundation of the Government, and is based upon the power of the State as sovereign to itself recognize or to compel any of its political subdivisions to recognize those obligations which, while not cognizable in any court of law, are yet based upon considerations so thoroughly equitable and moral as to deserve and compel legislative recognition.

There is no force to the objection that in ascertaining the facts provision must be made for a trial by jury, if demanded, or else that the Seventh Amendment to the Constitution of the United States is violated, which provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

This act does not infringe upon that amendment. The proceeding under it is not in the nature of a suit at common law, and the cases already cited show the power of the legislature to provide for payment by taxation of claims of the nature of those involved herein.

The cases of *Bank of Hamilton* v. *Dudley's Lessee*, 2 Pet.

492; *American Publishing Company* v. *Fisher*, 166 U. S. 464, and *Salt Lake City* v. *Tucker*, 166 U. S. 707, were cases of suits at common law, and *Thompson* v. *Utah*, 170 U. S. 343, was a criminal case. Those cases therefore do not apply here.

It is also stated that these claims were not incurred by officers of either a *de jure* or *de facto* government, and that hence there was no power in the legislature to compel the city of Guthrie to pay claims which it never agreed to pay either as a corporation *de jure* or *de facto*. But the cases above cited were cases where there was no legal obligation to pay the claims, and the acts in effect compelled their payment. The city here was under a plain moral duty to provide payment for honest and proper claims of this nature, and it seems as if it ought to be entirely ready to pay them. If any claims were without merit or fraudulent, there was opportunity to show such fact before the commission and also before the district court upon the hearing provided for by the act. The defendants in error say that there is by the act no opportunity provided for any investigation of these claims by the district court after the commission has reported the claims to that court, because the act does not give the court power to make any investigation for itself. We do not see that this is material even if true. We are of opinion, however, that the district court has such power. The statute provides in section 4 that the commission shall make a report to the district court, showing the names of the claimants and the amounts allowed by the commission, and also all the claims and the names of persons and amounts disallowed by them, and this report the statute directs shall be made "for the approval or disapproval of the district court." The report need contain nothing but what has just been stated, and it is obvious that on such a report alone the district court would be entirely without means of determining whether to approve or disapprove the decision of the commission in any particular claim. But as the report of the commission is to be made to the district court for its approval or disapproval, it follows as of necessity that the court has power to investigate for itself the facts upon which the claims were founded in order that it may intelli-

gently approve or disapprove of the decisions of the commission. It is not to be supposed that the provision in the act for making a report to the district court and for its approval or disapproval was a purely formal matter, and that the court might arbitrarily, unreasonably or improperly approve or disapprove any claim. If not, then the court must have power, in the necessary discharge of its duty to approve or disapprove, to ascertain the facts necessary to an intelligent discharge of that duty. These facts may be found by the court without a jury. As the statute does not provide for a report of the facts found by the commission upon which it based the allowance or disallowance of the claims or any of them, the court must itself find them, in order to approve or disapprove.

Although the act makes no provision for notice to the parties interested as to the time or manner in which the district court will proceed to investigate the character of the claims, yet in the absence of any such provision the court having the duty to investigate would have power to regulate the time of the hearing and provide for reasonable notice by its rules, so as to prevent surprise. This, in substance, was held in *United States* v. *Ritchie*, 17 How. 525, 533, where a similar lack of provision for notice in a certain section of the act was referred to and the power of the court to make rules in regard to it was asserted.

Whether the act is to be construed as making the decision of the district court upon the merits of any claim final, it is not now necessary to decide. The district court has refused to exercise any jurisdiction under the act, because it decided the act was invalid. Upon such a judgment we think a writ of error was properly sued out from the territorial Supreme Court under the ninth section of the act, c. 182, 26 Stat. 85, and under the same section a writ of error from this court to the latter court may properly issue.

The other questions set forth in the brief of counsel for the defendant in error, relating to parties and matters of procedure, we have examined, and regard them as without merit.

We are of opinion that the district court erred in dismissing these proceedings on the ground of the invalidity of the

act under which they were taken, and that the Supreme Court of the Territory erred in affirming that judgment of dismissal, and

We therefore reverse the judgment of the latter court and remand the case with directions to that court to reverse the judgment of the district court, with directions to the district court to proceed to a hearing of the claims upon their merits.

MR. JUSTICE HARLAN dissented.